FILE COPY

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 857

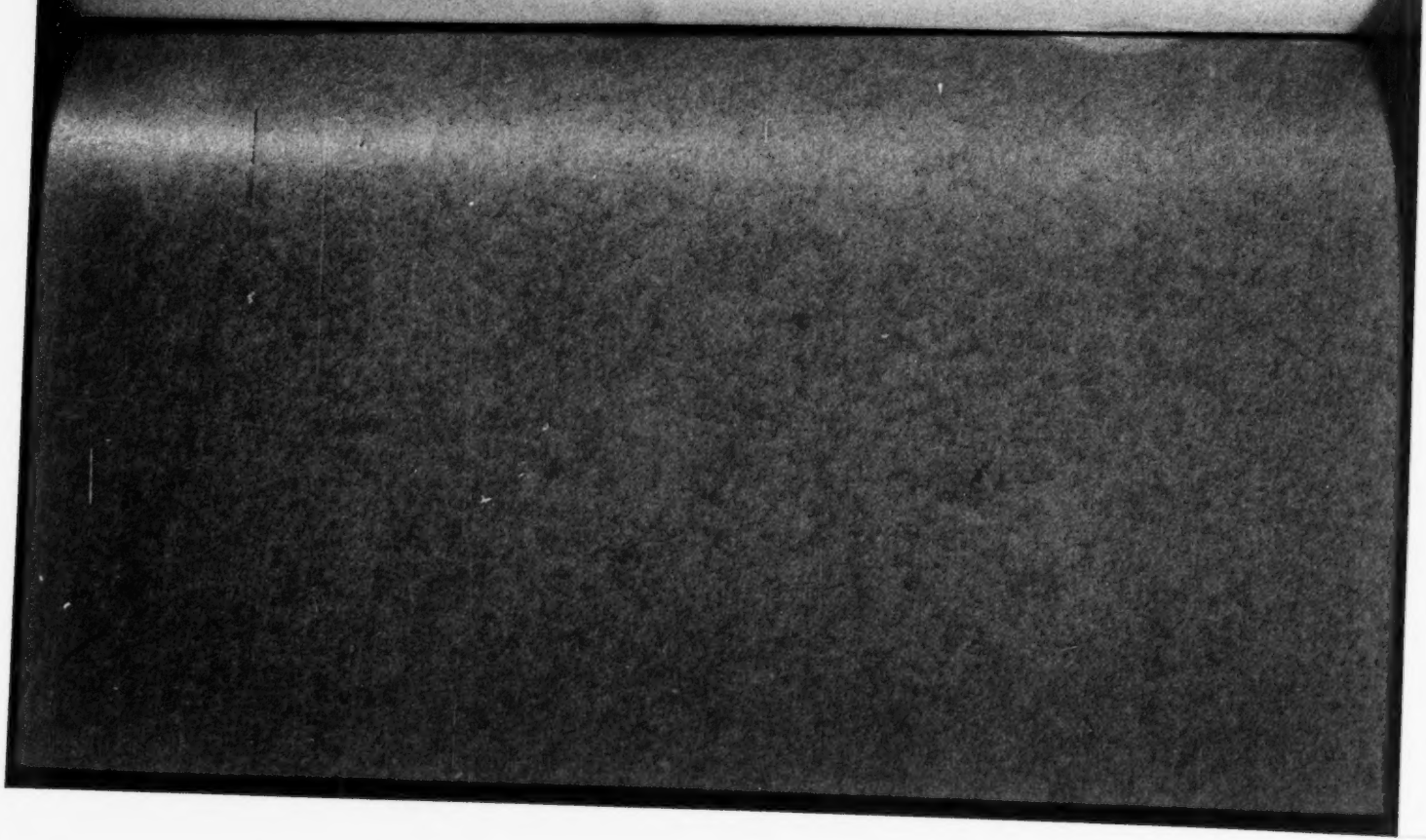
EMMA S. FAYERWEATHER and MARY W. [illegible],
Appellants,

against

THOMAS G. RITCH and others,
Appellees.

Brief for Appellants.

ROGER M. SHERMAN,
Counsel for Appellants.



INDEX.

	PAGE.
Statement of the case	1 to 43
STATEMENT IN DETAIL.	
Grounds of direct appeal from Circuit Court	1 to 4
Original bill of complaint	6 to 23
Demurrers	24
Course pursued on demurrers	24
Decision of Wheeler, J., on demurrers	24
Injunction granted by Lacombe, J	24
Statement of the facts affecting *res adjudicata*	24 to 25
Reversal of injunction order in C. C. A.	25 to 26
Pleas and answers interposed	26
Bill amended to assail *factum* of will and probate	26
Cross bill of Reynolds filed	27
Substance of cross bill	27 to 39
Defendants overruled their pleas; subject to final decree	39 to 40
Fiero cross bill filed, assailing will and probate	40 to 41
Decision against jurisdiction over probate	41

PAGE.

Jurisdictional question certified in allowance of appeal..... 41 to 42
Groups of errors assigned..... 42 to 43
Specification of errors by groups..... 44 to 72

ARGUMENT.

Point I, Jurisdiction of Circuit Court. 73 to 142
Point 2, Due process of law..... 143 to 145
Point 3, Decision on pleas, as to form and substance..... 146 to 147
Point 4, Comparison of views of C. C. A. and C. C. on *res adjudicata*... 147 to 164
Point 5, That releases were no bar.... 164 to 210
Point 6, Illegal interposition by C. C. A. by writ of error to deprive complainants of disclosure of contents of codicil of Nov. 11th..... 211 to 215
Point 7, Assignments against the proceedings whereby complainants were deprived of disclosure of the contents of the fourth codicil, executed November 11th, 1890, destroyed by Vaughan..... 215 to 256
Hamilton's case..... to 257
North Western University..... to 260
Decree contended for here..... to 261

In the Supreme Court of the United States.

EMMA S. FAYERWEATHER and MARY W. ACHTER, Appellants, *vs.* THOMAS G. RITCH, *et al.*, Appellees.	**No. 514. October Term, 1903.**

BRIEF FOR APPELLANTS.

Statement of the Case.

This appeal comes here from the Circuit Court of the United States for the Southern District of New York, pursuant to an allowance by the Honorable E. H. Lacombe, directly, and without any intermediate appeal to the Circuit Court of Appeals, by force of Section 5 of the Act of March 3, 1891. The first feature of this jurisdiction is the claim, set up in the bill of complaint (Record, Vol. 1, pp. 8, 22), considered and decided, adversely to appellants, by the final decree (Record, Vol. IV,

p. 694, 782, 783), that a prior judgment in an action in the Supreme Court of New York, which was relied on by appellees as a conclusive adjudication between the parties of all the matters set up in the bill of complaint, deprived the appellants of property, without due process of law, and deprived them of the equal protection of the law, in violation of the 14th Amendment. The subject matter of the suit is the estate of Daniel B. Fayerweather, deceased. In the progress of the cause in the Circuit Court, facts were first disclosed, which, with previously known facts of persuasive force, justified and led to an amendment of the bill of complaint so as to allege that a will, upon which the rights of the parties to the estate of $6,000,000 rested, was invalid and its probate obtained by fraud practised in and about the procurement of the decree of probate. By the amendment, the complainants, appellants, sought to assail the probate and annul the will, as between the parties hereto, and to secure complete relief by the application of the rules of property which, in that case, must control the disposition of the estate. In other words, the second feature of appellants' case, so far as an appeal directly to this Court is concerned, is the presence in the record of a question of the jurisdiction of the Circuit Court of the United States, to wit:

Has the Circuit Court of the United States jurisdiction to adjudge a will and its probate, as between the parties to the record, to be null and void, when obtained not only by fraud in the execution of the will, but also by contrivance and fraud in and about the procurement of the decree of pro-

bate, where there is the requisite diversity of citizenship, where the amount involved is $6,000,000, and where the remedy invoked in equity in the Circuit Court is one authorized and applied, under the same circumstances in the State Courts of general equitable jurisdiction?

This question of jurisdiction, if it were the only question in the record which could come here under Section 5 of the Judiciary Act, must, of course, come here as a single certified question unmixed with any one of merits; but in view of the fact (a) that the case is properly here upon the other constitutional question, and (b) that the allowance of the appeal in connection with the assignments of error, clearly presents the jurisdictional question, the whole case must be considered and decided.

Horner *v.* U. S. No. 2, 143 U. S., pp. 576, 577.
Chappell *v.* Same, 160 U. S., p. 509.
Press Publishing Company *v.* Munroe, 164 U. S., pp. 110, 111.
Scott *v.* Donald, 165 U. S., pp. 71 to 74.
Huguley *v.* Galeton, 184 U. S., p. 295.
Home Life Ins. Co. *v.* Fisher, 188 U. S., p. 727.
Davis *v.* Farnum, 189 U. S., p. 216.
Spencer *v.* Duplan Silk Co., 191 U. S., pp. 528-529.

The inherent propriety of a decision here is obvious, when it appears, and the fact is, that upon

the question whether the judgment set up as an adjudication is, so applied, a violation of the 14th Amendment, two of the Judges of the Circuit Court, Judges Wheeler and Lacombe, have sustained our contention, while the only two who have taken the contrary view, Judges Wallace and Shipman, have prevailed only because they sat in the Circuit Court of Appeals, when they so decided upon an interlocutory appeal. Judge Lacombe, while accepting their authority, takes pains to point out that their reasons are unsatisfactory.

Another diversity of opinion in the Federal Courts upon a question in this record which can only be settled here, is the question of jurisdiction. Since Judge Lacombe decided in this case that so much of the contentions of the appellants as sought relief from an invalid will and a fraudulent probate, but must be dismissed for lack of jurisdiction, the Circuit Courts of Appeal in the Eighth and Ninth Circuits have decided the question the other way, overruling the authorities relied on by Judge Lacombe, and asserting that this Court, if it has not directly sustained the jurisdiction, has done so indirectly.

These are the jurisdictional questions involved here, and they are raised in the manner stated, as will be shown more at length in the convenient development of the case.

The cause being technically, properly here, the dependent questions involved arise upon the case now to be stated.

(The record will be cited by the Volume in Roman and the pages in Arabic numerals. Vol. V is the record in Amherst *v.* Ritch, Vol. VI is the record in the Surrogate's Court upon the probate of the Fayerweather will.)

The appellants were complainants in the bill in equity filed in the Court below in July, 1897, which (as subsequently amended) will be found in Volume I, pp. 1 to 72.

That bill did not then contain the features relating to the impeachment of the will and its probate, which were added on June 26, 1899 (Vol. I, p. 255), that is to say, it did not contain the statements at folios 41 and 42, Vol. I, p. 21.

The complainants were nieces and next of kin of Daniel B. Fayerweather, deceased, entitled in case of his intestacy, to shares of his estate amounting to upwards of $2,000,000, and in case of his partial intestacy as to his residuary estate, to upwards of $1,000,000. Their right thereto depends upon the asserted invalidity of releases charged to have been obtained from them by fraud. The bill made parties, persons and corporations, of citizenship diverse to that of complainants, being three executors of the will of Daniel B. Fayerweather, Messrs. Ritch, Bulkley and Vaughan, John B. Reynolds, sole executor of the will of Lucy Fayerweather, and, in her life, the widow of said Fayerweather, forty-eight colleges, hospitals, seminaries and other institutions, the sister of Lucy Fayerweather, Anner A. Reynolds, and another niece of Daniel B. Fayerweather, a sister of the complainants, Lucy J. Beardsley.

A decree *pro confesso* was ordered against the corporations, made defendants beneficiaries under a certain deed of gift made by these executors, the remaining corporations, beneficiaries under the will of Fayerweather, consist of 20 colleges and 5 other institutions, contesting the bill, or being out of the jurisdiction.

No question of any defect of parties has been made, and it will be an unnecessary digression in a statement, necessarily protracted, to show that all parties necessary to the cause are joined. No relief is sought herein which affects any but parties to this record.

The bill of complaint contains, briefly stated, the allegations following.

After the formal averments (Vol. I, pp. 1 to 5), complainants allege that five of the colleges, defendants, brought an action in 1893 in the New York Supreme Court, wherein all the other parties here were defendants, the complaint therein being exhibited. It is at pages 26 to 41, Vol. I.

Thereupon the complainants made answer (which is exhibited, Vol. I, pp. 42 to 61). The issues so joined came on to be tried in the State Supreme Court; these complainants gave evidence tending to prove their allegations and thereupon it became the duty of the Court to adjudge whether the releases which they assailed were invalid and whether they were entitled to the affirmative relief prayed. The issues so tendered were necessary to be determined before any valid judgment upon those issues could be given pursuant to due process of law, the law of the land and the provisions of the Constitution of the United States.

There then was and now is within the Southern District of New York real and personal property, the residuary estate of Daniel B. Fayerweather, to the amount and of the value of upwards of $3,000,000, which was the amount of his estate in excess of one-half thereof. Said estate by operation

of law, upon the death of said Fayerweather, became the property of complainants to the amount of $2,000,000, they being the nieces and next of kin of the decedent. Except as their title had been divested by the releases, complainants were immediately entitled to the possession and enjoyment of said sum and said property, which remains in the actual possession and control of the defendants, Ritch, Bulkley and Vaughan, claiming to hold it and to have the legal title thereto, as executors of the will and codicils thereto, of said Fayerweather, or as residuary legatees thereof; but in fact holding it in their own wrong and under color of a secret trust, void by the statutes of the State of New York, and using their wrongful possession and control thereof to coerce and compel these complainants, in ignorance of their rights in the premises, to release their rights upon an inadequate consideration paid to them by said defendants out of the very money so withheld, which releases are the same described in their said answer, and were procured, executed and delivered by these complainants, under the circumstances and misrepresentations and induced by the wrongful acts, set forth in said answer.

Upon the trial of that action the defendants (here appellees), confederated to prevent the entry of any judgment upon an actual determination of the invalidity of said releases, so in issue, requested and induced the Court to hold and decide, that the rights of the respective parties to said residuary estate, did not require any consideration or decision of said issues, and said Court thereupon made and rendered its decision, without

considering, passing upon or including in judgment the said issues, and omitted to decide upon these complainants' right to the affirmative relief by said answer prayed in respect to said releases. Thereupon a decision was filed and a judgment was entered, which are exhibited (Vol. I, p. 63-67).

Thereupon appeals were taken and said judgment was reviewed by the General Term of the same Court, sitting as a Court for the correction of errors, and not exercising any original jurisdiction; and thereupon said Court held and determined that the right of the respective parties to said property *did* require the consideration and decision of said issues; but, being informed by the record that said issues had not been, in fact, considered, passed upon or included in judgment, it became the duty of said Court, pursuant to due process of law, the law of the land and the provisions of the Constitution of the United States, to require and order that said issues should be in fact considered, passed upon and included in judgment by the Trial Court. Nevertheless, said Court at General Term, did not so order, but by various fictions of law, imputed to the Trial Term, the Court below, that it *had* determined said issues and *had* decided in favor of the plaintiffs in said action upon such determination, contrary to the truth and the fact, and thereupon pretended to adjudge and determine, as such Court for the correction of errors, that there was not sufficient preponderance of evidence to support the asserted invalidity of said releases, to render such imputed determination erroneous, as matter of law; but

that such imputed determination was supported by evidence sufficient to relieve the same from the assignment of error in so deciding. The General Term had no original jurisdiction to adjudge said issues and thereupon to modify the judgment so as to include the actual determination thereof; and it did not exercise such power, but confined its action wholly to the consideration of errors in the record. Upon appeal to the Court of Appeals, that Court determined that these complainants had no standing to be heard or to have their rights determined by said Court, and that the limitations imposed by statute upon the jurisdiction of that Court precluded any inquiry into the facts, the proof or the merits of said issues, but that said Court was bound by the formal record procured as aforesaid, and by the fictions thereby adjudged and had no power to review the same. During the pendency of the appeals, efforts for any other correction of the errors were suspended and by the affirmance of the judgment were placed beyond the power of the Courts below, except as the Court of Appeals should by its *remittitur* confer power upon said subordinate Courts to entertain and try these issues. Thereupon complainants applied to said Court of Appeals so to frame its *remittitur* as to permit said subordinate Courts to entertain and try said issues and the Court denied the application.

Complainants have exhausted their remedy in the State Courts and, except as they may obtain relief here, they are remediless and will suffer irreparable injury. Defendants are now, knowing that complainants never had any trial, pursuant

to the law of the land, respecting the validity of the releases, contriving under the forms of law, to secure the residuary estate, they have applied to the Supreme Court to direct the executors to pay over said estate, the property of complainants, and to distribute the same forthwith; and unless the Circuit Court interpose to restrain such action and shall take possession by its Receiver, the estate is in danger of being wasted and passing out of the jurisdiction, whereby the fraudulent devices and lawless judgment, aforesaid, will be effectuated and complainants deprived of the benefit of any decree herein.

It will be observed that this part of the bill of complaint states a case for assailing a judgment obtained without due process of law, in violation of the Federal Constitution, and for relief therefrom, as between the parties, which is followed up by the prayer (Vol. 1, p. 21 to 22). The prayer upon this part of the case is, in substance, that it be here adjudged that the judgment of the New York Supreme Court is a cloud upon the title of complainants to receive and have from Ritch, Bulkley and Vaughn, individually and as executors, or trustees, their proportionate share of the residuary estate of said Fayerweather; that said judgment is invalid, inoperative and void for matter not apparent upon its face, as against complainants, because the same was not responsive to the allegations and proofs, because essential and material issues were not determined therein, despite all due diligence and compliance with the legal conditions by them; because it was rendered upon fictions and inferences respecting material

issues and is fraudulent, beyond the jurisdiction of said Court, in violation of complainants' right to due process of law, secured to them by the Fourteenth Amendment to the Constitution of the United States, and contrary to equity and good conscience. That said judgment is not sufficient to bar them from having an adjudication in the Circuit Court of the issues so raised by their said answer in said State Court action and from an adjudication and decree herein that the residuary estate is held by the defendants, Ritch, Bulkley and Vaughan, in trust for the benefit and use of complainants to the extent of their distributive share thereof; and for an accounting and payment.

In other words, complainants come into a Court of Equity for the removal of an impediment in the way of equitable relief, created by a judgment rendered in violation of their right to due process of law, and created by releases invalid, because obtained by fraud, which they sought vainly to have determined, in the judgment assailed, and which they ask shall be determined in the Circuit Court of the United States.

Having set forth the grounds upon which this impediment should be removed, they proceed to set forth in the bill of complaint the substantive grounds of their equities, as follows (Vol. 1, p. 10 to 21):

On November 15, 1890, Daniel B. Fayerweather departed this life at the City of New York, leaving a last will with five codicils thereto. The will was executed October 6, 1884. It is exhibited (Vol. IV., p. 183). Among other things it pro-

vides "EIGHTH: After the payment of the legacies and bequests thereinbefore made, I give and bequeath to * * * then follow bequests varying from ten to twenty-five thousand dollars to five hospitals. "NINTH: Subject to the conditions and limitations in this paragraph hereinafter contained I give and bequeath to * * *

Then follow bequests varying from fifty thousand to three hundred thousand dollars to twenty colleges or institutions of learning. This clause then ensues: "In case the condition and circumstances of any of the institutions named in this paragraph of my will shall be so changed that, in the judgment of my executors, it is not expedient to pay over all or any of said moneys to such institution, I authorize and empower my executors in the exercise of their discretion to withhold or reduce the amounts herein directed to be given. If my estate shall not be sufficient to pay in full all the legacies and bequests in this my will contained the legacies and bequests provided for prior to this paragraph of my will shall be first paid in full and the bequests contained in this paragraph shall be paid *pro rata.*"

TENTH: All the rest, residue and remainder of my estate, real and personal, of which I die possessed, I give, devise and bequeath unto my executors, to Have and to Hold the same, in trust, nevertheless, to sell and to convert into cash, and to divide the same equally among the several corporations mentioned in the Ninth paragraph of my will, share and share alike.

The ELEVENTH paragraph nominated as executors, the defendants Ritch and Bulkley .

The bill continues. The first of the codicils was executed December 13th, 1884 (about two months after the will). It is exhibited (Vol. IV., p. 189).

It provides for the revocation of the Tenth paragraph of the will and in lieu thereof, provides as follows:

"All the rest and residue of my estate of whatsoever character and wheresoever situated the same may be, of which I die possessed and remaining, after the provisions of the first nine paragraphs of my will have been fully complied with and carried into effect, I give and bequeath to Justus L. Bulkley and Thomas G. Ritch, named in the Eleventh paragraph of my said will, to them and their heirs, forever."

The second codicil, executed January 7th, 1888, exhibited (Vol. IV., p. 191), provides, among other things, for the addition to the executors named in the will, of the defendant, Vaughan.

The third codicil, executed March 19, 1889, exhibited (Vol. IV., p. 193), so far as material here, increases an annuity to Miss Joyce (now the wife of John B. Reynolds, an appellant), from one to four thousand dollars; and the bequest to these complainants, recognizing them as daughters of his brother William. it increases from ten to twenty thousand dollars, each.

The fourth codicil, executed November 11th, 1890, is not exhibited for reasons explained, involving the illegal destruction thereof by the defendant, Vaughan. This codicil has been the subject of much controversy, involving a direction by Judge Lacombe that Mr. Butler, who drew it and refused to disclose its contents, be committed

for contempt. whereupon a course of practice was adopted (upon which appellants assign error), whereby a writ of error at the suit of the witness was interjected into the trial of this equity cause, upon which the interlocutory ruling in the original suit was reversed by Judges Wallace and Shipman, in the Circuit Court of Appeals, as appellants claim, by an unauthorized misuse of power, without jurisdiction, and whereupon the Circuit Court submitted thereto, contrary to its duty, as appellants claim. They are, to this day, deprived of discovery of the contents of that codicil, which they seek, and which, they aver, will vitiate the assumed title, testamentary disposition and powers, involved in the litigation in the State Courts, when the contents of that codicil shall be disclosed. In short, make the Five College judgment the exposition of the construction of a will which did not exist.

The bill continues. The fifth of the codicils (miscalled the fourth, by the appellees), was executed on November 15th, 1890, within a few hours of Mr. Fayerweather's death, which occurred about 10 o'clock on the night of that day (Vol. II.. p. 816). It is exhibited (Vol. IV., p. 196).

That codicil changes the provision of the first codicil, making Ritch and Bulkley residuary legatees, by adding Vaughan as such. It contains no other bequests, no other disposition of property.

The bill goes on. The will, without the codicils, was admitted to probate by the Surrogate of New York County, February 24, 1891, the codicils, except the fourth, March 24th, 1891; let-

ters testamentary were granted to Ritch, Bulkley and Vaughan, who qualified and took possession of all the property and estate of Fayerweather. Its value is upwards of $6,000,000. The residuary estate referred to in the will and in the first and fifth codicils, is upwards of $3,000,000.

It was the intention of Mr. Fayerweather to leave the principal part of his estate to the institutions of learning mentioned in the ninth paragraph of his will. He attempted to accomplish that purpose by the will. It was prepared by the defendant, Ritch, as his legal adviser, who advised him that under the statute of New York, no person having a husband, wife, child or parent, could by a last will and testament devise or bequeath to such institutions as were named in the ninth paragraph of his will, in trust or otherwise, more than one-half of his estate, and that such devise or bequest would not be valid to the extent of more than one-half. Then follow the facts attending the execution from time to time of the several codicils. It is alleged that the will was executed under the understanding and agreement between Mr. Fayerweather and Ritch (apparent from private memoranda disclosed upon the contest over the probate, but which were until the week of Mr. Fayerweather's death, in the exclusive custody of Mr. Ritch and unknown to anyone but him and the testator), that Mr. Fayerweather's purposes embodied in the tenth paragraph of his will, in conflict with the New York Statute of Wills, should be effectuated without exposing it to the condemnation of that statute, by the device of a secret trust, under which the residuary estate

POOR COPY

should go to the executors, in form, individually and absolutely, while they should, in conscience and by the operation of these private writings, be bound to apply the estate to the same objects provided for in the tenth paragraph. The will, as drawn, contained a peril, in addition to the prohibition of the Act in question, inasmuch as there was another statute (Chapter 319 of the Laws of 1848, Sec. 6), which made invalid any bequest to institutions of the kind benefited, by a will executed less than two months before the testator's death. That may be correctly described as a true statute of mortmain. That peril was averted by taking the risk from October 6th to December 13th, 1884, of the failure of the tenth clause; the first codicil which gave the residuary estate to the executors, as individuals, for the purposes of the secret trust, being executed soon after the lapse of the prescribed time under the statute of mortmain.

On the 11th of November, 1890, Mr. Fayerweather executed a further (the fourth) codicil by which he revoked the said devise to Ritch and Bulkley, and made some disposition of his residuary estate which is well known to the defendant, Vaughan, but is unknown to complainants, discovery whereof is prayed, and that such effect may be given thereto as may be just and equitable. That codicil was destroyed by the said Vaughan, on November 15th, 1890, unlawfully and with the intention to facilitate him and his co-executors, in the concerted plan of coercion, oppression and duress, by them practised, as thereinafter charged, upon complainants, to obtain the releases.

On November 15th, 1890, the defendants, Ritch, Bulkley and Vaughan, or one or more of them, acting for himself or for the others, advised and procured Mr. Fayerweather to execute another codicil (the fifth), whereby he purported to ratify his said will and the first, second and third codicils, to confirm the revocation of the tenth paragraph of the will and to amend the first codicil, so as to add the defendant Vaughan to Ritch and Bulkley, as residuary legatees.

Complainants insist that these residuary legatees, having obtained the residuary estate in the manner set forth, are chargeable in the Circuit Court in equity, as trustees thereof for complainants.

The situation at the commencement of this suit being thus set forth in the bill, the complainants proceed with the statement of the circumstances upon which the assailed releases came into existence and upon which they are assailed, as follows:

Mr. Fayerweather at his decease, left him surviving, a widow, Lucy Fayerweather, and these complainants and Lucy J. Beardsley, nieces and next of kin. The will and the four codicils, not the fourth above described, were in due form offered for probate and the widow and next of kin interposed objections to such probate. Objection to the probate of the will were withdrawn and it was admitted to probate on February 24th, 1891; but a contest upon the codicils went on.

Pending such contest Ritch, Bulkley and Vaughan were the trustees of the complainants, as aforesaid, in respect of such residuary estate,

and under a fiduciary duty toward complainants to make full disclosure of all the facts affecting the rights of these complainants in and to the residuary estate, and not to set up or carry on any adversary proceedings in derogation of such trust, or to combine or confederate with any of the other parties to this suit against complainants to coerce them to surrender or release their interest in the residuary estate for the benefit of any of the other defendants, or to set up and maintain any colorable claims of right to the said interest of complainants in favor of any others, or to raise any cloud upon the title thereto of complainants, and not to obstruct, hinder or delay complainants in the recovery of their said interests, and not to place complainants at a disadvantage in dealing with said Ritch, Bulkley and Vaughan, or any other defendants, by withholding their said interest or threatening them with litigation, duress of property or loss, to induce the complainants to surrender or release their said interest, and not to hold out or represent to complainants that any illegal or unfounded trust, was a valid bar and impediment to the said rights of these complainants.

They further aver that the said fifth codicil was executed when the testator was at the point of death. He was no longer rational or of sound or disposing mind. He was not able to read said codicil or to understand the import thereof. The said Vaughan excluded from his presence all persons who were interested in the disposition of said residuary estate, or who could impose any restraint upon the uncontrolled domination of

said Vaughan over the acts of said Fayerweather. He was unable to hear or see said codicil or to sign the same. The act was the act and will of said Vaughan and not of said Fayerweather. Said Vaughan used the hand of said Fayerweather to sign the codicil, but the mental act was that of said Vaughan. The determination, however, that said codicil was invalid, so far as complainants then had reason to know or believe, would leave in force the tenth paragraph of said will, which would come to the same thing, so that complainants would have no standing to attack the validity of said fifth codicil. They were not then inhabitants of the State of New York and were not chargeable with knowledge of its laws. The effect of the devise of more than one-half of the estate to such institutions was one resting in the judgment of lawyers learned in the New York laws. Complainants were entitled to rely upon their contentions under the circumstances, as representations of fact. They did not know and were not informed or advised that they had a clear right to share as next of kin in one-half of said estate; but on the contrary, said Ritch, who was a member of the bar of the State of New York, and the defendants, Bulkley and Vaughan, represented to complainants, by counsel learned in the law aforesaid, that their said rights were unfounded and that they had no claim upon said estate which they could enforce. Said defendants represented to complainants that said Ritch, Bulkley and Vaughan were residuary legatees in their own right and free from any secret trust of the whole of said residuary estate and threatened

to withhold all share in said estate and prolong litigation to defeat all claims of complainants. They falsely held out and pretended that complainants had no rights which they could enforce or convey, and that, to buy peace and as an act of grace and without any duty or obligation towards these complainants they would give complainants a sum, which was in fact equal to about one-eighth of the actual interest of these complainants in said residuary estate, if complainants would execute the releases and withdraw objections to the probate of said codicils and refrain from any further contest, objection or claims. The other defendants mentioned in the ninth paragraph of the will, combined with said executors to secure said releases upon the misrepresentations aforesaid, and agreed to the payment of one-eighth of said residuary estate to complainants, out of that estate itself, in the hands of said Ritch, Bulkley and Vaughan, to carry out the object of the conspiracy. The complainants were of scanty means and unable to continue a contest at a distance from their domicile and unable to judge of the truth of the representations. They were not upon equal terms with said defendants or with the other claimants to participate in the residuary estate. They were moved and induced by these representations and by the advantage taken by said trustees of their superior knowledge of the facts and of the laws of New York, to execute the releases described in and annexed to their answer in the State Court. (These are in Vol. IV., p. 208, 210.)

There is first an agreement to release which, in

substance provides that, in consideration of the "Deed of Gift," Mr. Beardsley, acting for the complainants and executing the agreement for them, as their attorney in fact, the complainants withdrew all objections to the probate of the will and four codicils; that no suit shall thereafter be brought for the construction of said will and codicils or to set them or either of them aside; that the releasors agree not to make any claim upon Ritch, Bulkley and Vaughan, or either of them, their heirs or personal representatives, or as residuary legatees, other than for amounts left by the will and codicils, the deed of gift, and another paper dated March 5, 1891 (Vol. IV. p. 205), that, upon the payment of all the several amounts mentioned in the deed of gift and said paper, releasors will execute a general release of all claims, except those arising under the will and codicils, both to the executors, to the donees mentioned in the deed of gift and to Bulkley, Ritch and Vaughan, individually.

The deed of gift is exhibited (Vol. IV, p. 198). It was made February 24, during the probate contest. Mr. Beardsley's wife, the other niece, took a personal advantage of $100,000 by the settlement (Vol. IV, p. 198, "third"). In addition thereto she took $100,000 more under the seventh clause of the will (Vol. IV, p. 184).

The "deed of gift" was the individual act of Ritch, Bulkley and Vaughan. Thereby they undertook near the end of the probate contest, to give away the bulk of the residuary estate to institutions, which, yith few exceptions, were not in the will, and some of which Mr. Fayerweather, in

his life, had distinctly excluded from his benefices The remainder was used chiefly to pay the price of the releases (Vol. IV,p. 198 to 204). Complainants' allowance was $42,500 each (Vol. IV, p. 206). Out of this they had to pay $25,000 to the counsel retained by Mr. Beardsley to represent them.

Attention is invited to the form of the releases themselves (Vol. IV, p. 210).

They run to Ritch, Bulkley and Vaughan, as executors, individually, and as representatives of a class known as "donees," and to said donees. They recite that the sum paid is in compromise and full settlement of any and all contest, on the part of the releasor, of the will or concerning the estate, and the release embodies the deed of gift "in order that the persons constituting said class of donees and to whom this release runs, may be more fully known, and it operates upon all and all manner of actions, causes of action, suits, debts, dues, sums of money, claims and demands whatsoever in law or in equity, which against the said persons or corporations or any of them, the releasor ever had, or now have, or which she or her heirs, executors or administrators thereafter can have by reason of any matter, whatsoever, except her claim for the annuity given her by the will and codicils thereto, and her claim for the increased annuity mentioned in the agreement dated March 5th. 1891."

The bill continues that the consideration of $42,500 each was inadequate for the release and agreements, entitled as complainants were, each, to

$500,000 and upwards, which was unknown to them and concealed from them by said defendants. They charge that by reason of the premises said agreement, settlement and releases are and every one of them is, fraudulent and void and ought to be so adjudged and said writings delivered up to be cancelled. Complainants offer to come to an account and perform what may be equitable. They further allege that they were not informed and did not know the facts aforesaid, respecting the Fourth codicil until after the judgment of affirmance rendered at General Term in the Five College action, and then refrained from bringing this suit because of the pendency of that action and the reasonable expectation of amending and securing a trial of the issues therein. They further allege that payments were made by Ritch, Bulkley and Vaughan out of the residuary estate to the amount of upwards of $850,000 without any authority for which they should be required to account.

The bill further charges and prays that the decrees of the Surrogate of the County of New York whereby the testamentary papers in question were admitted to probate, are and each is fraudulent, null and void and should be set aside and altogether held for naught, that they should be relieved therefrom and restored to all they have lost by reason thereof; that the Circuit Court should, in lieu thereof, establish and compel due performance of the true and lawful, last will and testament of said Fayerweather, or, in lieu of any such, compel the payment and distribution of the estate of said Fayerweather according to law.

For general relief.

The other defendants, except donees under the deed of gift, and others who obtained extensions of time to plead, filed a demurrer to the entire bill, as originally exhibited (Vol. I, pp. 73, 76, 79).

The issues of law raised by the demurrer to the original bill came on before Judge Wheeler and were fully argued and, after six months' deliberation, Judge Wheeler filed an opinion (Vol. I, p. 83) in which he fully sustained the equity of the bill, not, however, passing on the question of jurisdiction to assail the probate, which came into the case subsequently, by amendment of the bill, as already stated. The complainants then moved before Judge Lacombe for an injunction and Receiver. Judge Lacombe denied the motion for a Receiver, but granted the injunction. In his opinion (Vol. I, p. 96), Judge Lacombe approved the decision of Judge Wheeler and held that, in view thereof, it must be assumed that there has been no adjudication in any Court sufficient to constitute due process of law, as to the validity of the releases which complainants impeach as being obtained by fraud. It will be observed that no discussion appears of the rights of the complainants, except for the releases, to recover. The decision of the State Courts was finally placed upon the view that the residuary estate was immediately upon the death of Mr. Fayerweather, the property of complainants, that but for the releases they were entitled thereto, that the title of the colleges rested, not upon the ground on which they placed it by their complaint, not upon the foundation upon which Judge Truax placed it; but upon a conveyance by complainants, which, contrary to the entire theory

of the Five College action, and contrary to the decision at Special Term, is deduced from the very releases which the Trial Justice refused to consider. Judge Truax held that complainants had nothing to release, and that the issues which they tendered of fraud in the procurement of the releases, were immaterial. They were ultimately held to be the foundation of the title of the colleges. It is apparent that the sanctity given by the rule of *res adjudicata,* to a form designed to prevent a second trial of an issue, once actually tried on the merits as matter of fact, is all that stands between these complainants and their property of at least $1,000,000 here. The simplest statement of this case, so far as the residuary estate is concerned, is whether the purchase from them of $1,000,000 for $85,000, paid out of their own money, under the fraudulent practices alleged, and in ignorance of their rights, can never be subjected to the scrutiny of a Court of Equity, because the same Court which refused to consider their grievance, their sale of their birthright to the appellees, has by some intellectual *hocus pocus,* labelled *res adjudicata,* at the same time and while so refusing, conclusively adjudged the importance and validity of the instrument of sale. We believe that if any judicial language in terms supports such a monstrous result, this Court will find other terms in which to set forth the real rule of *res adjudicata.*

That is not the view of the Circuit Court of Appeals in the Second Circuit. It held that there must be an end of litigation, that a fiction of adjudication in the teeth of the fact, was all the law

requires, and that the interest of the Republic required, not justice, but that we must submit to injustice after we had been heard by dull ears for as many times as the State judges had been assailed with our clamor (Vol. I, p. 103). This decision was rendered by two judges upon interlocutory appeal from the injunction order. Instead of following the settled rule that, after a solemn decision on the law of the case upon demurrer, the question on such an interlocutory appeal is whether the Circuit Judge acted in granting the injunction lawfully, the said Judge being under the rule of judicial propriety bound to follow the law as held on demurrer, until it shall be directly reversed; and the question, upon that interlocutory appeal, not being before the Circuit Court of Appeals, the two Judges reversed the law as held by two other Judges, who happened to be sitting in the Circuit Court, and directed the dismissal of the bill (Vol. I, p. 107). The defendants, except some who answered the bill after this irregular reversal of Judge Wheeler's decision on demurrer, filed pleas of *res adjudicata,* which were set down for argument upon exceptions, and some were sustained on the authority of Judge Wallace's decision, others being overruled.

The bill was then amended by setting up the attack on the will and codicils (Vol. 1, p. 21). The defendant, John B. Reynolds, as executor of Lucy Fayerweather, then answered the amended bill and filed a cross bill, which are exhibited (Vol. 1, pp. 224, 262).

All the defendants had leave to plead over to the amended bill, Hamilton being required to elect

whether to stand on her plea to the original bill, which that college elected to do (Vol. I, p. 229). The cross bill of Reynolds set up in substance, as follows:

He is sole executor of the last will and a codicil thereto of Lucy Fayerweather, deceased, by force of certain letters testamentary, duly granted unto him on or about the 9th day of September, 1892, by the Surrogate of the City and County of New York, where said Lucy Fayerweather was domiciled and resided, at the time of her death, said Surrogate having jurisdiction in the premises.

He has duly qualified as and remains such executor.

There was filed in the said Circuit Court of the United States for the Southern District of New York, on or about the 1st day of June, 1897, a certain bill of complaint, wherein, the defendants Emma S. Fayerweather and Mary W. Achter are complainants and your orator, and the foregoing defendants herein, except said Joshua M. Fiero, and the said Randolph and Macon College at Boydton, are defendants. Several answers have been filed thereto by some of said defendants, the time to reply to which has not yet expired. The time of this complainant to answer said bill has not yet expired, and as to said defendants, said cause is not yet at issue.

Certain others of said defendants are in default for want of answers; while the defendants, the Trustees of Hamilton College, have filed a plea to said bill, upon which issue has been joined by the replication of the complainants thereto, and the time for taking of testimony thereunder has not yet expired.

The object of said bill of complaint is to secure the payment to complainants, and others, including your orator, upon grounds therein stated, of the residuary estate of Daniel B. Fayerweather, deceased, amounting to about $3,100,000, and to obtain a decree for the cancellation of certain releases and the avoidance of certain decrees of the Surrogate's Court of the county of New York and of certain judgments of the Supreme Court of the State of New York, as colorable clouds upon the title to said residuary estate of said complainants and others; all of which relief is therein prayer.

The testatrix Lucy Fayerweather of whose will and codicil your orator was appointed and remains executor, as aforesaid, was the widow of said Daniel B. Fayerweather and survived him, and as such was entitled to three-sixths of said residuary estate.

But the grounds upon which she was so entitled are not in said bill set forth truly and entirely, and the remedies, redress, prayers, and relief, therein demanded, are not so alleged and supported, to the best of the knowledge, information and belief of your orator, as to entitle him to such relief by answer under said bill as he can obtain by cross bill; and he is entitled to redress and relief as between himself and other defendants in said bill as will more fully hereinafter appear. This he can, by the settled practice in equity, obtain, only by a decree upon this, his cross-bill of complaint which he brings and files accordingly.

Further complaining, your orator further alleges.

There was at the filing of said bill of complaint

herein, within the jurisdiction of this Court and within the Southern District of New York, real and personal property, the estate of Daniel B. Fayerweather of which he died, seized and possessed to the amount and of the value of upwards of six millions of dollars.

Said estate by operation of law, was and became on the 15th day of November, 1890, upon the death of said Daniel B. Fayerweather which occurred on that day in the City of New York where he had theretofore resided, as to one-half thereof, by virtue of the last will and testament, hereinafter described, executed on the 2d day of October, 1880, vested in executors therein named, for the uses, and with the powers hereinafter set forth, and as to the rest and residue thereof, amounting to upwards of $3,100,000, said estate, then and there, by operation of law was and became the property of Lucy Fayerweather, as the widow of said Daniel B. Fayerweather, the testatrix of this complainant, together with the defendants Emma S. Fayerweather, Mary W. Achter and Lucy Beardsley, who were then and there nieces and only next of kin of said Daniel B. Fayerweather, the share and interest thereof of said Lucy Fayerweather, amounting to three-sixths of said residuary estate, said residuary estate being then and there property not devised, as more fully appears by the said will, a copy of which is hereunto annexed and marked Exhibit A. The institutions in the 9th and 10th clauses of said will mentioned were all charitable and literary corporations.

On or about the 24th day of February, 1891, there was admitted to probate by the Surrogate of

the County of New York a paper purporting to be the last will and testament of said Daniel B. Fayerweather, and on or about the 24th day of March, 1891, four certain alleged codicils to said pretended will, which are the same hereinafter described, were likewise admitted to probate, and a decree or decrees entered in said Surrogate's Court on or about the 24th day of March, 1891, adjudging said papers to have been duly executed, and published and establishing the same as a will of real and personal property, and directing that the same be recorded, and that letters testamentary issue thereon to the defendants, Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan, as executors of the last will and testament of said Daniel B. Fayerweather, deceased; and letters testamentary were issued to them accordingly, and said defendants, under color thereof, have taken possession of all the property and aforesaid estate left by said Daniel B. Fayerweather, and now hold the same or have misapplied the same to their own uses.

Said probate and decrees were procured and obtained by said defendants Ritch, Bulkley and Vaughan acting in concert with the other defendants herein, except said defendants Emma S. Fayerweather, Mary W. Achter, Anner Amelia Reynolds, Joshua M. Fiero, Lucy Beardsley and the Randolph and Macon College, and by the aid, procurement and connivance of said other defendants, by the intimidation, duress, suppression of the truth, misrepresentation, fraud and abuse of position, power and opportunity hereinafter set forth, practised upon said Lucy Fayerweather,

whereby and in pursuance of which, without any consideration and not otherwise, she was induced to acquiesce in the probate of the said alleged will and to execute, sign and deliver two certain writings, copies of which are hereunto annexed and marked respectively, Exhibits B and C.

Upon said acquiescence and upon said writings, the said decrees of said Surrogate's Court were obtained and entered by said defendants.

Said defendants Thomas G. Ritch and Henry B. Vaughan, prior to the probate of said alleged will held out to said Lucy Fayerweather and pretended that said will was the last will and testament of said Daniel B. Fayerweather and that it was necessary that it should be immediately admitted to probate to enable them to make provision thereunder for her necessities of life, and other provision made for her comfort and maintenance by her husband; and she being ignorant that the said will was not the last will of her said husband as hereinafter alleged, and that the said Exhibit A and other instruments herein alleged to be his last testamentary papers, were such, and believing said representations, consented to and acquiesced in said probate.

The said Lucy Fayerweather, however, duly objected to the probate of four certain alleged codicils to said alleged will for various reasons, and thereupon said defendants (with the exceptions aforesaid), through and by the said Ritch, Bulkley and Vaughan, withheld from said Lucy Fayerweather, the necessities of life, and the provision which her husband had made for her maintenance and comfort, and compelled her to live upon credit

and borrowed money, meantime threatening to continue so to withhold the said provision and to expend the entire estate in litigation, unless she would cease her contest and execute said papers Exhibits B and C.

Said Ritch, Bulkley and Vaughan then and there represented to her that they were residuary legatees of said estate in their own right under valid provisions in said codicils, denying, although they well knew the contrary to be the truth, that she had any right, title or interest in said residuary estate.

The said Lucy Fayerweather was then suffering from a mortal disease, as the said defendants well knew, and her strength, judgment, firmness and resolution were so impaired, and her distress of mind was so great, that she was by reason of the premises coerced and intimidated into executing said Exhibits B and C, and into withdrawing her opposition to the probate of said codicils.

During the life of said Lucy Fayerweather she was not aware and did not know the facts hereinafter stated, concerning the will of 1880 (Exhibit A), or affecting the will of 1884 and its alleged codicils hereinafter stated.

As part of the consideration and inducement held out and offered by said defendants to procure the execution of said Exhibits B and C and which moved and influenced said Lucy Fayerweather to execute the same, was a promise and agreement, then and there, by them made, that they would, in consideration of the execution thereof convey to her forthwith upon the probate of said codicil, the family burial plot and tomb in Woodlawn Cemetery, in the City of New York.

But the said defendant in violation of said agreement, upon receiving and procuring the benefit of said Exhibits B and C, and being, thereby enabled to perform said agreement, conveyed and transferred said burial plot and tomb to the defendant Lucy Beardsley, which failure of consideration, of right should and did, impair and invalidate said Exhibits B and C.

Further complaining your orator further alleges:

That the said alleged last will and testament dated October 6, 1884, was not the act and will of said Daniel B. Fayerweather, but was null and void and the execution thereof was procured by undue influence, covin and fraud practiced upon the said Daniel B. Fayerweather by the defendant Thomas G. Ritch, in this, that the said Ritch, for years prior to and at the time of the execution of said alleged last will, was an attorney at law, and the legal adviser of said Daniel B. Fayerweather, and in that capacity enjoyed his confidence; that he persuaded said Daniel B. Fayerweather who wished to leave his estate in violation of Chapter 360 of the Laws of New York of 1860, that is to say, to leave a greater part than one-half thereof to corporations and institutions within the prohibition of that statute to make said will in violation of said statute, which, by the tenth clause thereof, he did, making him, said Ritch, an executor thereof with such a discretion concerning the disposition of the estate, as to enable him, said Ritch, to coerce the beneficiaries to acquiesce in such disposition thereof as said

Ritch should determine upon; which was done accordingly as will appear from said will, a copy of which is annexed, marked Exhibit D. Further contriving for his own use and advantage to get possession of and enjoy said estate, the said Thomas G. Ritch persuaded the testator to execute a codicil to said will whereby he, said Ritch, was made a legatee of the residuary estate; and by these devices and papers the said Ritch was empowered by the exercise of the discretion conferred by the said will, Exhibit D, to throw the bulk of said estate into the residuary estate, and by force of said codicil, to become, with said Bulkley, the owner and beneficiary of nearly the entire estate.

It was not the intention of said Daniel B. Fayerweather to make any such will, and he executed said will and the first three codicils thereto without understanding the same or their legal effect, and relying on the advice and representations of said Ritch as his attorney, that the discretion so conferred upon said Ritch by said will and the devise to him of said residuary estate by said codicil, was a lawful mode of effectuating the wishes of said Daniel B. Fayerweather, aforesaid. Whereas, as said Ritch well knew and said Daniel B. Fayerweather was ignorant, the said discretion conferred by the will was void, for uncertainty and otherwise, and the said devise enabled said Ritch to claim the residuary estate as his own.

Further complaining, your orator further alleges:

A few days before his death, the said Daniel B.

Fayerweather first knew what the legal effect of said Exhibit D, with its codicils, was, and he then attempted to execute and to publish a codicil to said Exhibit D, whereby he sought to annul the same, in those respects, wherein it differed from the said Exhibit A, and in substance and effect re-established said will of 1880, and divested said Ritch of all control or discretion over said estate, and removed him from the capacity of executor. Said codicil is in the possession and power of said defendant Vaughan, and the particulars thereof are well known to said defendants and are unknown to this complainant, and he therefore prays that the same may be fully disclosed, and when disclosed, if valid, and so far as valid, effectuated.

On the 15th day of November, 1890, while said Daniel B. Fayerweather was dying, and was no longer competent to execute a will or to make any testamentary dispositions, the defendants Ritch and Vaughan procured and induced employes and agents by them thereunto instigated, to enter the dying chamber of said Daniel B. Fayerweather and, placing a pen in his hand and sustaining, supporting and guiding it, to place his name, which was by said persons, or one of them, misspelled, upon a pretended codicil which purported to reaffirm the said will, exhibit D and the first three codicils thereto, and to join said defendant Vaughan with said defendants Bulkley and Ritch, as residuary legatee of said estate.

This paper was not the will, act or deed of said Daniel B. Fayerweather. He was incompetent to and did not understand its import. While it was being executed as aforesaid said Vaughan ex-

cluded said widow from the room where said testator was,and suppressed from her and from said next of kin all knowledge of what was so being done.

The decrees of said Surrogate's Court aforesaid purport to admit the said alleged will, exhibit D and the first three codicils and the last pretended codicil aforesaid, to probate; and said decrees constitute the only title or color of title to said estate, either as executors, legatees, trustees or otherwise, of said Ritch, Bulkley and Vaughan.

The said papers exhibits B and C were procured by fraud, duress and intimidation as aforesaid and were without consideration and there has been a substantial failure of the pretended and expressed consideration; and the same ought to be declared null and void and delivered up to be canceled.

The said decrees of said Surrogate's Court were obtained by fraud as aforesaid and the proof taken in support of the papers thereby admitted to probate was false and untrue (in all respects) as the said defendants Ritch and Vaughan then and there well knew; and certain proof which was well known to them, being proof of the facts herein in that behalf alleged, was by them actively suppressed; which would have defeated said probate and without the acquiescence and papers Exhibits B and C for that purpose used by said defendants to prevent a contest and due presentation of full proof the said decree or decrees would not have been rendered.

Thereby said Surrogate's Court was moved and induced to believe and decide that said will, Ex-

hibit D, and said pretended codicils thereto, were the last valid testamentary papers of said Daniel B. Fayerweather, and the fact and the proof thereof to the contrary, hereinbefore alleged, were suppressed and not adduced in, to or before said Court or the Surrogate.

The existence of said will, Exhibit A, was unknown to complainant until on or about the 5th day of February, 1894. The facts herein charged in relation thereto were not known to complainant until more recently. During all the meantime there has been other litigation between the parties hereto, which complainant was justified in believing, and did believe, precluded the institution of any suit for the relief herein prayed.

Edward M. Upham, mentioned in Exhibit A, died before the commencement of this suit, and left and has no personal representative.

Your orator therefore alleges and prays that it may be decreed herein:

That the said writing, Exhibit A, is the last will and testament of said Daniel B. Fayerweather.

That the decree and decrees of the said Surrogate's Court admitting said will, Exhibit D, and the codicils thereto, to probate, were obtained by undue influence and fraud, and are null and void, with all proceedings thereupon or thereunder.

That the said Exhibit D and said four codicils, by said decree admitted to probate, are against public policy and uncertain, and were obtained by undue influence and fraud, and are null and void.

That by the legal effect of said will Exhibit A, the provision as to one-half the estate is in violation of the statute, and to that extent the estate

passed upon the death of said Daniel B. Fayerweather to said Lucy Fayerweather and said defendants, next of kin, as provided by the statute, commonly called the statute of descent and distribution.

That the legal title of said entire estate passed by virtue of said will Exhibit A to the executors named therein and to their legal successors, and that they are entitled to take and to hold the same, subject to the valid trusts therein contained and subject to said rights of said Lucy Fayerweather and of this complainant as her sole executor, as aforesaid, and of said next of kin.

That the defendants Ritch, Bulkley and Vaughan account for said estate which had come into their hands and pay over such sums as appear upon such accounting to be due from them, to said executors under said will, Exhibit A, or in such manner as may be equitable or the Court may direct.

That such other defendants as have received any part of said estate, to which they are not entitled, be required to account for and pay over the same, in like manner.

That such defendants as have received any part of said estate, in excess of what they are entitled to receive, may be required to account for and pay over the same in like manner.

That each party may be charged with such sums, if any, as he or she may be entitled to and shall have received.

That said Exhibits B and C be declared null and void and delivered up to be cancelled.

That this complainant and said next of kin receive their respective shares of said estate.

For an Injunction and a Receiver and
For general relief.

That this cause may be heard and decided with the cause aforesaid whereunto this is filed as a cross-bill as aforesaid.

Without multiplying interlocutory proceedings, in this statement, it suffices to say that some defendants answered, testimony has been taken under answers and replications thereto. Pleas were interposed to the amended original bill, and to the cross bill. The pleas were excepted to and set down for argument, when they were sustained by Judge Lacombe under the controlling authority of Judge Wallace's opinion. Previous proceedings were allowed to stand, and finally, when the cause came on for final hearing, outstanding answers were allowed to be withdrawn and pleas substituted. Replications had been filed putting the *truth* of the pleas at issue, testimony on that point was before the court, differing as to some defendants which stood on the testimony in the case of Hamilton. These defendants had declined to adopt or follow the proofs of the executors who had, as complainants insisted, overruled their pleas by going into evidence at large upon the merits of the case, outside their plea of *res adjudicata*. They were therefore in the position of parties subject to a decree on the merits, at final hearing. As to them, at least, complainants here and now, insist, they are entitled to a final decree in their favor on the merits; not merely a decree that the pleas are bad in substance and false in point of fact. They insist that the cause came on in such condi-

tion below that complainants were entitled there to a final decree in their favor and that this court should, therefore, direct such a decree. Complainants contend, however, that, not only Ritch, Bulkley and Vaughan overruled their pleas and thus converted them into answers, failing upon the issues thus presented; but that Hamilton did so; not by putting in the same evidence as the others, outside the pleas; but other evidence, equally outside their pleas. The support for this contention will be pointed out in the suitable order. All the pleas as they stood or were made to stand at final hearing are open to this contention. They are severally found in the record Hamilton's plea and those defendants which adopted it (Vol. I, pp. 176, 190, 233, 234, 238, 239, 240). Ritch's plea and those which adopted it (Vol. I, pp. 191, 206, 230). Bulkley and Vaughan's plea (Vol. I, p. 209).

The cross bill of Reynolds places this attack upon the probate and the will upon grounds additional to and different from that taken in the amended bill of complainants. It seeks to annul the probate for fraud practiced upon Lucy Fayerweather, distinct from that charged by the complainants, more particularly affecting her. The facts in this regard will be more fully discussed by counsel for Reynolds, executor, who has taken a separate appeal.

There were at final hearing pleas to this cross bill, and replications thereto which are found in Vol. I, pp. 277, 291, 293, 306, 307, 322, 323.

Joshua M. Fiero, an executor under the 1880 will, set up in Reynolds' cross bill, being made a party defendant thereby, appeared, answered and

filed with his answer, another cross bill (Vol. I, p. 328). This cross bill set up sufficient facts to annul the probate of the will and codicils at bar, and set up as the only last will, the one of 1880. A motion on several grounds was made by the defendants, here appellees, to strike this cross bill from the files; it was granted "ON THE SOLE GROUND THAT THIS COURT HAS NO JURISDICTION TO GRANT THE RELIEF PRAYED FOR IN THE SAID CROSS BILL OR ANY PART OF SAID RELIEF" (Vol. I, pp. 345, 346).

The Circuit Court thus held that it had no jurisdiction to entertain the question of probate and will, as stated in the first part of this brief. The pleas all being "former adjudication by the Five College judgment," being as shown under the 1st point inapplicable to the question of fraud in the probate of the will of 1884 and its codicils and there being thus no defence to the assault on the probate and will, but the lack of jurisdiction, it follows that the decree appealed from, so far as the question of probate, valid will, discovery of the destroyed codicil, determination that Mr. Fayerweather died intestate or establishment of the earlier will is concerned, rests solely upon lack of jurisdiction. If the jurisdiction exist, the decree follows.

The allowance by Judge Lacombe of the appeal, in connection with the assignments of error, make it clear that this was the determination of the Court at final hearing. The allowance is as follows (Vol. IV, p. 840): "The foregoing appeal is hereby allowed October 15, 1903, for the review of the questions set forth in the assignments of error filed herewith, *as well of jurisdiction as otherwise*. E. Henry Lacombe, U. S. Circuit Judge."

The assignments of error (Vol. IV, p. 784, Complainants' first, second, third, fourth. fifth, sixth, seventh, eighth, ninth, tenth; cross complainant's [p. 811], first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth), assign the decision that the Circuit Court had no jurisdiction over this probate to ascertain the validity of wills, with fullness and particularity, as error.

The University of Rochester came to final hearing with a demurrer, notwithstanding its former demurrer was overruled. The decree put that defendant in the category of pleas of Bulkley and Vaughan (Vol. IV, p. 781).

Such being the pleadings and the course of procedure which brought them into that condition, complainants now proceed to set forth the assignment of error upon which they rely, then proposing to discuss them in detail.

It will be necessary in discussing these topics to set forth the evidence relating to each in the appropriate connection, rather than to set it forth in any preliminary, general statement.

The assignments of error may be conveniently grouped into seven classes:

1. Against the determination concerning the jurisdiction of the Circuit Court over the controversy as affecting probate and wills.

2. Against the determination that the five college judgment is due process of law to estop complainants from having a decision upon the merits upon every part of their claim.

3. Against the decisions upon evidence in support of the pleas, whereby the several defendants

overruled their pleas and converted them into answers, so that the case came on for final hearing, upon answer, replication and proof; and is here for decree upon the merits.

4. Against the decision that the judicial views of Judge Lacombe were not the test of complainants' rights at final hearing, notwithstanding the different views of Judges Wallace and Shipman, in the Circuit Court of Appeals, upon the interlocutory appeal from the injunction order, by which decision appellants have been deprived in the Circuit Court, as they were in the State courts, of the judgment upon matters of fact, of the court of original jurisdiction, by an erroneous view of the law of the case.

5. Against the rule of *res adjudicata* as laid down by Judge Wallace in the Circuit Court of Appeals, followed, under constraint by Judge Lacombe at final hearing, and sustaining the rule, as applied by Judge Wheeler, upon the hearing of the demurrers. The pleas were set down for argument upon exceptions to their validity and were sustained in harmony with Judge Wallace's opinion. These assignments insist upon those exceptions.

6. Against the determination that the releases were any bar to complainants' case, even if the judgment pleaded adjudged them to be valid upon the facts since disclosed.

7. Against the proceedings whereby complainants were deprived of disclosure of the contents of the fourth codicil, executed November 11th, 1890, destroyed by Vaughan.

Specification of Errors.

I. *Against the determination concerning the jurisdiction of the Circuit Court over the controversy as affecting probate and wills.*

The assignments of errors respecting the probate and testamentary features of the case may as well be considered from the point of view of both appellants. If there is any fuller presentation thereof in the cross complainant's than in the complainants' case, then, the cross complainant's assignments may as well be made the basis of discussion.

These assignments are in Vol. IV, p. 811 to 815.

This subject is covered by those numbered from one to ten, sixty-third and sixty-fourth.

First.—The Circuit Court erred in its decision that the judgment in the New York Supreme Court was an adjudication of the matters in the Reynolds' cross bill; or, not treating it as an adjudication, in treating the Reynolds' cross bill as it treated the cross bill of Fiero, dismissing it "upon the sole ground that the court had no jurisdiction of any of the matters therein"; where the property involved was adversely claimed by virtue of a decree of probate, obtained by false and fraudulent practices upon the parties and upon the probate court; the will and codicils so probated not being the last will, but null and void; where another will exhibited, was the last will; where probate thereof had been prevented by fraud and contrivance of parties defendants to this suit; where all the dealings of

those defendants with the estate were based upon the fraudulent probate and false will; where prior suits in respect thereto were vitiated for fraud in and about the probate of the will; where the claims, counterclaims and defenses in the suit and its subject matter, were affected by these allegations and the defense of *res adjudicata* was undermined by a genuine last will; where full and equitable disposition of the suit and the rights of the parties could not be had, but by consideration of these allegations, by the nullification of the probate decrees so assailed and by the establishment of the will set up by the cross complainant and its enforcement, as the basis of the rights of the parties, in respect to the subject matter of this suit, it erred in deciding that it had no jurisdiction to entertain such averments or grant relief.

Second.—The Circuit Court erred in dismissing the cross bill upon its determination that said court had no jurisdiction to grant the relief prayed, in so far as it charged in substance fraud and contrivance in and about the procurement of the probate of the will of 1884, and its codicils and prayed that the defendants be required to answer such allegations and for a decree, either that, as between the parties, said probate decree was null and void, or that said defendants go into the probate court or into some court having jurisdiction and there consent to the vacating of said fraudulent decree and to the entry of a decree admitting said last will to probate and do what is equitable in the premises, either in this suit or

by the mandate of the Circuit Court, in some other court or place.

Third.—The Circuit Court erred by its decree establishing an estoppel against the cross complainant, available elsewhere, confirming the defendants in their title and possession of the estate of Fayerweather, nevertheless deciding that it had no jurisdiction to entertain the allegations set up in the cross bill and proof thereof, which were adequate to impeach such title.

Fourth.—The Circuit Court erred in deciding that it had no jurisdiction to entertain a cross bill of complaint in any suit between adversary parties upon a subject matter of general, equitable cognizance, having the requisite diversity of citizenship, for the due disposition of the equities wherein it became essential to hold a probate decree null and void, between the parties, for fraud in and about its procurement, or wherein it became essential to establish a will of realty or of personalty, as the measure of right between the parties.

Fifth.—The Circuit Court erred in deciding that cognizance of the establishment of a will, either of realty or personalty or the application thereof as a measure of right between the parties in a suit in equity wherein the requisite diversity of citizenship and grounds therefor exist, does not appertain to said court.

Sixth.—The Circuit Court erred in deciding

that a will of realty or personalty can have no effect in said court unless it have been previously established by a decree of a probate court.

Seventh.—The Circuit Court erred in deciding that cognizance of a will of realty or personalty, not only *ex parte,* but *inter partes* is under no circumstances within the jurisdiction of that court unless it have been previously established by a decree of a probate court.

Eighth.—The Circuit Court erred in deciding that it could not render any relief upon the amended, original bill, inasmuch as it could exercise no probate jurisdiction.

Ninth.—The Circuit Court erred in deciding that it had no jurisdiction to consider any of the allegations of the complainants, inasmuch as certain relief prayed involved the establishment of a will, in lieu of that probated, which it held it had no power to decree; although the probate court, from a defect of power to bring the necessary parties before it, from lapse of time, from being without jurisdiction to exercise equitable powers, or upon any other ground, could not or would not entertain jurisdiction to deal with the facts by complainants alleged, and although there were no adequate remedy at law or in any other court.

Tenth.—The Circuit Court erred in deciding that it had no jurisdiction to decree that complainants were, under the 1880 will, being the true

will of Fayerweather, beneficiaries of a trust in respect of the realty affected and entitled to have executed a power of sale by those appointed to take, hold and dispose of the realty, for the uses in said will appointed and for their benefit, and to require the defendants to do what was necessary, by way of account, conveyance and otherwise, to effectuate such trust.

Sixty-third.—In that the Circuit Court held that the complainants were not entitled to have the will of 1880 applied as the measure of right between the parties hereto.

Sixty-fourth.—In that said Circuit Court held that the entire estate of Fayerweather, as between the parties hereto, did not pass as in the case of intestacy, under the Statutes of the State of New York.

II.

Assignments against the decision that the Five College judgment is due process of law to estop complainants from having a decision upon the merits upon every part of their claims (Vol. IV, pp. 788 to 791).

Eleventh.—In that the said Court decided, and it is decreed, that, by the judgments of the Supreme Court of the State of New York in the suit of Amherst College *et al.* against Ritch *et als.* (151 N. Y., 282), as an adjudication of the mat-

ters and things in said amended original bill alleged, the State of New York has not deprived said complainants of property without due process of law, and that, thereby, they have not been denied the equal protection of the law.

Twelfth.—In that the said Court decided that the said judgments of the Supreme Court of the State of New York, and each of them were competent evidence herein, against these complainants, of an adjudication of the matters and things in said amended original bill alleged; and therein said Court overruled the objection of these complainants to said evidence, that, as such adjudication, said judgments, and each of them, deprived them of property without due process of law, and denied them the equal protection of the law.

Nineteenth.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q., to the witness Daly) admitted the record on the appeal to the Court of Appeals, in the action of Amherst College against Ritch upon the offer, and under the objection, following:

"*Mr. Parsons.*—We next offer in evidence the record on the appeal to the Court of Appeals; and we are willing to stipulate that, so far as the record embraces the record on the appeal to the General Term, only the record of the Court of Appeals should be so used. We ask to have it marked." Which should have been excluded because it was duly objected to on the ground that the Supreme Court, at General Term, under pretense of affirming the udgment of the Court below, made and

affirmed *a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void*, including the order and judgment of the General Term; and also as incompetent, irrelevant and immaterial and not within the issues.

Twentieth.—In that said Court, in the proofs of the defendants Ritch and others (after 6 Q., to the witness Daly) admitted the order described in the offer, and under the objection, following:

"*Mr. Parsons.*—We offer in evidence an order, made in that action, bearing date March 10, 1897, made by the Special Term of the Supreme Court, ordering that the judgment of the Court of Appeals be made the judgment of the Supreme Court.

"*Mr. Sherman.*—That is objected to for all the reasons last stated, to wit: Objected to on the ground that the Supreme Court, at General Term, under pretence of affirming the judgment of the Court below, made and affirmed *a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void*, including the order and judgment of the General Term; and also incompetent, irrelevant and immaterial and not within the issues."

Twenty-first.—In that said Court, in the proof of the defendants Ritch and others (after 6 Q., to the witness Daly) admitted the judgment-roll; the judgment entered upon the decision of the General Term; the appeal to the Court of Appeals; the remittitur thereof; the papers upon a motion to amend the remittitur; the order upon that motion,

and the final judgment in the action of Amherst College *et al.* against Ritch *et als.*, upon the offer, and against the objection, following:

"*Mr. Parsons.*—The papers that we offer, in addition to those which have been previously offered, are the judgment-roll in the Amherst College suit, including the judgment entered on the decision of the General Term; the appeal to the Court of Appeals; the remittitur of that Court, and the papers on the motion to amend the remittitur and for a reargument; the order of the Court of Appeals upon that motion; the order of the Special Term already marked, making the decision of the Court of Appeals the judgment of the Supreme Court; and the final judgment entered in the action."

"*Mr. Sherman.*—Each, every and all of them are objected to, for the reasons last stated in full, to wit: Objected to on the ground that the Supreme Court, at General Term, under pretence of affiming the judgment of the Court below, made and affirmed *a judgment not within the pleadings in the action, but in conflict therewith; and that the proceedings thereafter were without jurisdiction and void*, including the order and judgment of the General Term; and also incompetent, irrelevant and immaterial, and not within the issues."

III

Assignments against the decisions upon evidence in support of the pleas, whereby the several defendants overruled their pleas and converted

them into answers, so that the case came on for final hearing upon bill, answer, replication and proof; and is here for decree upon the merits (Vol. IV., pp. 791 to 809).

Forty-third.—In that said Circuit Court did not, upon final hearing, treat the cause as one upon said cross-bill, *pleas which stood for answer*, replication thereto, and proofs, but treated the cause as presented upon cross-bill, *pleas*, proofs; replication and proof; and thereupon sustained the pleas, and decided that they were a bar to all the matters in said cross-bill alleged, set up and propounded; and rendered a decree thereupon, dismissing said cross-bill upon its merits; whereas said Court should have decided that said pleas were disproved; and should have awarded to this cross-complainant a decree upon cross-bill, *answer*, and replication upon the merits, sustaining the allegations and prayers of his said cross-bill, with suitable provisions to effectuate the same.

Forty-fourth.—In that the Circuit Court should have decided that the defendants, and each of them, had, by the form of their pleas, and the introduction of evidence, at large, outside the issues presented thereby, overruled their pleas; so that the cause was properly before the Court for final hearing upon the merits.

Forty-ninth.—In that the said Circuit Court overruled the objections made by these complainants to the introduction under the pleas of the Trustees of Hamilton College, and those defendants in like case with them, *of the record* in the suit of the Trustees of Amherst College *et al.* against

Ritch *et als.*—so far as it contained proofs or evidence of matters *outside of* the judgment roll.

Fiftieth.—In that the said Circuit Court overruled the contention made by said complainants that the introduction under the plea of the Trustees of Hamilton College and those defendants in like case with them, by said defendants, of the proofs and evidence, and of matters *outside of* the judgment roll, in the suit of the Trustees of Amherst College *et al.* against Ritch *et als.*—including *the briefs* presented to the State Court by the attorneys and counsel for this cross-complainant, in that action, *was evidence at large in this cause; not* responsive to the issues, presented by the pleas; tending to support a defense *not* pleaded; and in not thereupon overruling said pleas, depriving said defendants of the advantage of the plea; and in not holding that the record presented a case upon bill, *answers*, and replication; and *therefore* requiring a final decree upon the merits.

Twenty-second.—In that said Court, in the proofs of the defendants Ritch and others, question 220 Q., to John B. Reynolds, a witness called by defendants, allowed the question, referring to letters written to Mrs. Fayerweather by her attorneys, against the objection following:

220 Q. "Have not turned over to whom?

"*Mr. Sherman.*—Counsel for complainants object to this whole line of examination, and to the present question, on the ground that, *in order to have the benefit of their pleas, as pleas, these defendants must confine their proceedings thereunder to the issues raised thereby; and that the object of their pleas being, to avoid going into the*

evidence at large, the defendants, by going into evidence at large, outside the issues raised by their pleas, waive their pleas; and can have no advantage from their pleas, except as answers; and counsel for complainants hereby gives notice to the defendants that the complainants will, at all times, insist that the defendants have, by that, waived their pleas; and that any further testimony, outside of the issues raised by the pleas, will likewise be insisted upon to have worked the effect above stated."

Twenty-third.—In that said Court, in the proofs of the defendants Ritch and others, question 237 Q. to said witness, referring to Mrs. Fayerweather's papers mentioned in a certain *subpœna duces tecum*, served upon said witness by said defendants, allowed the question, against the objection, following:

237 Q. "What did you produce?"

"*Mr. Sherman.*—Objected to on the ground that the *defendants, so far from observing the rule respecting the taking of testimony under a plea, so far from observing the principle that the object of a plea is to prevent the delay and expense of taking testimony at large, are not only taking their testimony at large*, but are employing the time of the parties in inquiring into wholly immaterial explanations, or proving obvious, physical facts, occurring under their own observation; and thereby offending every principle which authorizes the introduction of a plea in an equity suit."

Twenty-fourth.—In that said Court, in the proofs of the defendants Ritch and others, 267 Q., to said witness, allowed the question referring to

letters written to Mrs. Fayerweather by her attorneys, against the objection, following:

267 Q. "Have you done what Judge Lacombe said you must do?

"*Mr. Sherman.*—Objected to on the ground that no occasion, opportunity, or request, pursuant to the Judge's order, has been made; that it is not self-operative; but requires some request in order to set it in motion; and, therefore, it is obvious that the witness has not done what he has not been called upon to do; and *I make the same objection that I did before, as to the effect of the course of the defendants, in travelling outside of the issues raised by the pleas, and taking evidence at large in the case; and again notify them that I will insist upon that contention at final hearing, and in all Courts on appeal.*"

Twenty-fifth.—In that said Court, in the proofs of the defendants, Ritch and others, 276 Q., to said witness, allowed the question against the objection, following 276 Q.: "Is the course which has been adopted by you under Judge Lacombe's order taken by you under the advice of counsel; have they advised you to do what you have done and to abstain from doing what you have not?"

"*Mr. Sherman.*—Objected to, on the ground that these defendants first interposed to the bill of complaint herein, a demurrer; that the demurrer was overruled by Judge Wheeler, after six months' consideration; that these defendants thereupon answered, and subsequently obtained leave from the Court to withdraw their answers, and to file pleas, upon the pretense that the case was barred by said pleas, setting up only the effect of the

alleged adjudication of the matters propounded by the bill, by virtue of judgment in the so-called Five Colleges' action ; that, in obtaining leave to rely upon said pleas these defendants pretended and represented to the Court that they ought to be allowed so to plead, as a matter of favor, not then being entitled so to do as matter of right ; because it would be oppressive, harsh, burdensome and expensive to compel the litigants *to go into the evidence at large ;* and upon that pretence and claim, and upon that alone, they were allowed to file said pleas ; that *the matters which have been inquired of*, by the examination of this witness, have been *entirely outside, and unrelated to any question presented by the pleas*, as to existence, or effect, or validity of the adjudication of the Five Colleges' action ; but have been addressed so far as they had any legal tendency whatever, *to show some estoppel against the widow of Daniel B. Fayerweather ;* and as against the complainants in the original bill ; by virtue of facts alleged or claimed to have been communicated to them through the medium of their own counsel ; that the counsel for the defendants have now occupied an hour and a half in a course of questioning of this witness, oppressive, immaterial, frivolous, and obviously leading nowhere, for the purpose of oppressing the complainants with the worst features of examination into the evidence at large in the cause ; contrary to every principle in equity ; contrary to the 67th Rule ; and contrary to the limit afforded these defendants by virtue of their pleas ; *and thereupon the complainants again repeat their protest and claim and insist that the pleas are to be taken as answers ; and are waived as pleas ; and are overruled by the testimony taken under them ; and*

that the matter is at large, without reference to the pleas ; and that, therefore, this present question is incompetent, irrelevant and immaterial."

Twenty-sixth.—In that said Court, in the proofs of the defendants Ritch and others, 501 R-D-Q., to said witness, allowed the question against the objection following :

" 501 R-D-Q. How much did she receive from Mrs. Fayerweather before she died ?

" *Mr. Sherman.*—Objected to on the ground that this witness was called by the defendants ; that the present inquiry does not relate to any matter touched upon or alluded to upon the cross examination, and is, therefore, not re-direct examination ; that, under the pretense of re-direct examination, under a protest that the cross examination was irrelevant, the counsel for the defendants are now going into *new matter in chief, which is entirely outside any issue raised by any pleas,* and not even competent evidence at large, upon any topic presented by the bill or cross-bill ; and *counsel for complainants gives the counsel for the defendants notice that he will at all times and places insist that, by the inquiry into such topics, under such circumstances, the defendants have waived their pleas ; and overruled their pleas and introduced evidence at large in the cause.* And I make the further objection that the only matter which is pertinent here, is what disposition was made of an estate of six millions of dollars, of which Daniel B. Fayerweather was robbed in his lifetime, or at his death ; and the property now inquired about, having been conceded to be the property of the persons whose disposition of it is now subjected to inquiry by counsel for the defendants."

Thirty first.—In that said Court, in the cross examination of the complainant Emma S. Fayerweather, allowed the defendants to go into *evidence at large in the cause*, upon the issues not presented by their pleas, as follows:

587 X-Q. "Miss Fayerweather, I want to give you the opportunity of stating what is your best recollection, upon the subject of how information, about the deed or gift, came to you; whether it came to you while you were in New York; or whether it came to you shortly after your return; and, in the latter case, whether it must have come to you by letter?"

Which question should have been excluded, because it was duly objected to, on the ground that the witness, not having requested any opportunity, there is no occasion for the inquiry; and that it has been already fully answered; also on the ground that *it is evidence at large in the cause; and the legal effect of introducing evidence at large in the cause by these defendants, the complainants will now and at all times insist upon.*

Thirty-second.—In that said Court, in the cross examination of the complainants' witness, Elizabeth L. Goodwin, allowed the defendants to go into *evidence at large in the cause*, upon issues not presented by their pleas, as follows:

232 X-Q. "When did you first see Mr. Reynolds in the household of Mrs. Fayerweather?

"*Mr Sherman.*—Objected to as not cross examination, but *independent evidence in chief at large in the cause; and the counsel for the complainants contends that, by this course of examination, the defendants*

overruled their plea; and raise all the issues which can be raised, under the several bills of complaint."

Thirty-third.—In that said Court, in the cross examination of the complainants' witness Goodwin, allowed the defendants to go into the *evidence at large in the cause*, upon issues not presented by their plea, as follows:

236 X-Q. "Was the marriage of Mr. Reynolds to Miss Joyce before, or after the occurrences, to which you have testified upon your examination by counsel for complainants?"

Which question should have been excluded, because it was duly objected to, as not cross examination, but *as evidence at large in the cause.*

Thirty-fourth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into *evidence at large, in the cause*, upon issues not presented by their pleas, as follows:

408 X-Q. "Please to state what was the position taken by Mr. Coudert, representing Mrs. Fayerweather; and Judge Rollins, representing the nieces?"

Which question should have been excluded, because it was duly objected to, on the ground that the position taken by the counsel mentioned will appear in the record; that it already appears that the position they took was taken without full knowledge of the facts, and in ignorance of the facts; and upon being misled by false representations of fact; and the concealment of material facts, represented to them not to exist; and because the opinion of adverse counsel, as to the con-

tentions made by opposing counsel, is the worst evidence that can be conceived of to establish that proposition.

Thirty-fifth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into *evidence at large, in the cause*, upon issues not presented by their pleas, as follows:

416 X-Q. "By whom was the case, of Mrs. Fayerweathers executor and next-of-kin, presented in the argument at the General Term?"

Which question should have been excluded, because it was duly objected to as being immaterial; and on the further ground that this is not cross examination of any matter inquired of in chief, either *de bene esse*, or any other kind of cross examination; and as new matter; whereupon the complainants insist that the defendants, by giving evidence at large in the cause in this matter, have overruled their plea.

Thirty-sixth.—In that said Court, in the cross examination of John E. Parsons, a hostile witness, allowed the defendants to go into evidence at large, in the cause, upon issues not presented by their pleas, as follows:

420 X-Q. "What was the position taken by the gentleman, purporting to represent the widow's executor and next-of-kin, upon the trial of that case?

Which question should have been excluded, because it was duly objected to as being incompetent, irrelevant, immaterial; not cross examination as to any matter inquired of in chief; because the

record is the best evidence; *and because this is evidence at large in the cause, and hence overrules the pleas.*

Thirty-seventh.—In that the Court allowed the question, upon cross examination of John E. Parsons, a hostile witness, following:

421 X-Q. "Mr. Parsons, in answer to question 17, you gave this testimony: 'The persons referred to were represented by most competent counsel, Judge Rollins and Mr. Coudert. Those gentlemen were, as I assumed, as I believed, fully possessed of all information bearing upon the subject; and I have every reason to suppose that in the discharge of their duty they communicated to their clients such information as they had, upon which subject I know nothing.'"

There was a motion made after that answer to strike out, as not responsive, "I wish you would state whether or not Messrs. Coudert or Rollins, so far as you know, were possessed of all information bearing upon the subject?"

Which question should have been excluded, because it was duly objected to, on the ground that the question involves the opinion of the witness, or the conclusion of the witness, of what the subject was; of what evidence bore upon it; and as to what Messrs. Coudert and Rollins had, or had not, in their possession, or knowledge; as incompetent; *as evidence at large in the cause;* and on the ground that the question should have a tendency to elicit the facts, from which the Court can draw the inference, embodied in the question.

Thirty-eighth.—In that the Court allowed the question, upon cross examination of John E. Parsons, a hostile witness, following:

429 X-Q. "Mr. Parsons, this examination is with reference to matters to which you have testified, which the counsel for the complainants moved to strike out, brought out by the direct examination. In answer to question 194, you stated, after referring to the deed of gift and the beneficiaries named therein, 'I have always understood that it met with the approval of Mrs. Fayerweather; at all events, I never heard anything to the contrary'. What understanding did you have, up to that time, with reference to the instrument being approved by Mrs. Fayerweather?"

Which question should have been excluded, because it was duly objected to, as calling for conclusions of the witness; and not for any fact which can be relevant or competent here; *as evidence at large in the cause;* and not cross examination; that the basis for the alleged cross examination consists of answers, forced upon the complainants, not responsive to their questions; at which they protested at the time; and moved to strike out.

Thirty-ninth.—In that the Court allowed the question, upon cross-examination of John E. Parsons, a hostile witness, following:

431 X-Q. "At the time that you had those conversations did Mr. Coudert know of the conversation between Mr. Vaughan and Mr. Fayerweather, of which Exhibit Oa was a memorandum?"

Which question should have been excluded, because it was duly objected to, as involving the conclusion of the witness; as not the proper mode of proof of what Mr. Coudert does, or does not, know; because it appears from the testimony of the witness that Mr. Coudert knew nothing about Exhibit Oa, until it was produced

in the Five College trial; and as incompetent, irrelevant and immaterial; *and as evidence at large in the cause.*

Said question was answered thus:

"My recollection is that the pencil-memorandum on the envelope, which subsequently, upon the Truax trial, became marked Oa, related to what passed between Mr. Fayerweather and Mr. Vaughan on November 15th, 1890. Mr. Vaughan testified that, in that conversation—testified upon the probate-contest, that in that conversation, there did occur what the memorandum indicated. The memorandum of itself showed nothing, other than a statement of subjects. Mr. Vaughan testified to the conversation itself. I wish to say of recollection, as well as part of the record of the contest, that what then occurred, informed Mr. Coudert fully of that conversation, so far as I had any knowledge or information about it then; or have ever had such knowledge or information since; and the suggestion or any suggestion, by anybody that Mr. Coudert made the settlement, in ignorance upon that subject, is absolutely untrue, and has no shadow of foundation."

Forty-first.—In that the Court overruled the objection, and denied the contention, made by counsel for complainants, upon the question addressed to the complainant, Emma S. Fayerweather, under cross-examination, following:

382 X-Q. (Handing paper.) "Look at the paper which I now show you, and tell me if your recognize that as the complaint in that action?"

Which question should have been excluded, because it was duly objected to as follows:

"*Mr. Sherman.*—Counsel for the complainants objects to the protracted examination which has occurred at the instance of counsel for the defendants, of matters having no relevancy whatever to the special plea, and *which*, if they have any legal tendency, *relate to matters at large in the case;* and which have no possible excuse or pretext in a *de bene esse* or provisional cross examination, inasmuch as those matters have not been inquired of in chief; and *insists that the defendants, having availed themselves of this opportunity to exploit the case of the complainants at large, shall hereafter be held to the strict rule in regard to the proof at large in the cause, after having filed a plea;* and shall not be permitted after exploiting the complainant's case to strike out the evidence upon the pretext that it was provisional cross examination; but insists that hereafter and that at all times and places *the defendants shall be held to the legal rule, that they have overruled their plea by going into evidence at large with full notice;* and that they are entitled to no benefit from the proof at large, inasmuch as it is not responsive to any pleading filed by them."

Forty-second.—In that the Court overruled the objection to the question asked by defendants of the complainant, Emma S. Fayerweather, upon her cross examination, following:

575 X-Q. "Did such a letter, so far as you know or were informed, come to Mrs. Achter?"

Which question should have been excluded, because it was duly objected to as being immaterial, on the ground that the writing of any such letter, if any such were written, is a crime; that it is in violation of the Penal Code, and of the Statutes of the United States, inasmuch as the attempt to intimidate or influence the parties to a pending action by threats is a crime; *on the ground that it is evidence at large in this case;* that it has no relation to any of the issues in this case, etc.

Sixty-fifth.—In that said Circuit Court erred in rendering any decree, save a decree overruling and disproving the pleas herein, and awarding to complainants the relief prayed for in the amended, original bill.

IV.

Assignments against the decision that the judicial views of Judge Lacombe were not the test of complainants' rights at final hearing, notwithstanding the different views of Judges Wallace and Shipman, in the Circuit Court of Appeals upon the interlocutory appeal from the injunction order. So that appellants have been deprived here, as they were in the State Courts, of the judgment upon matters of fact, of the Court of original jurisdiction, by an erroneous view of the law of the case (Vol. IV, pp. 806, 807).

Fifty-second.—In that said Circuit Court held that it was constrained to its said decree, against its own judgment, by operation of a certain decision or

opinion given in the Circuit Court of Appeals upon appeal herein from an order reversing its order of injunction herein; which said decision was rendered upon an interlocutory appeal, upon a record made up of affidavits, wherein these appellants had no opportunity of cross examination of witnesses, and which decision further assumed to overrule the solemnly declared law of the case in favor of the complainants and its interlocutory decree thereon overruling demurrers to the bill, which said decree was not before the Circuit Court of Appeals for review, whereby that Court assumed, beyond its powers and established practice, indirectly to reverse a solemn decision in favor of complainants upon the equity of the bill, which that Court had no jurisdiction to do by a direct appeal, wherein the Circuit of Appeals ignored and disregarded its obligation, as well as the obligation of the Circuit Court, to treat the solemn judgment upon demurrer to the bill as the law of the case until it should be directly reversed upon appeal from a final decree, and to conform all incidental features of the case, and particularly an injunction *pendente lite* thereto. So that the complainants were subjected to the imposition of costs, by an assumption of power by the said Circuit Court of Appeals, upon the reversal of said injunction order; and the decision so made was no restraint upon the power, or bar to the propriety, of the decision by the Circuit Court, and an award of a final decree in favor of complainants, in conformity with the expressed opinion of the said Circuit Court and of two of its Judges, that the complainants were entitled to a decree in their favor.

Fifty-third.—In that said Circuit Court, held

by the Honorable E. Henry Lacombe, decided that, pursuant to the due and orderly practice in equity, it was not required to follow the decision and decree overruling the demurrer to the original bill made by the Court, held by the Honorable Hoyt H. Wheeler, the convictions of the said Court being unchanged, and that the said Circuit Court was constrained by the decision of the Circuit Court of Appeals, held by the Honorable William J. Wallace and the Honorable Nathaniel Shipman, upon appeal from an interlocutory injunction order, made by the Honorable E. Henry Lacombe, to overrule and disregard the said decree overruling the demurrers.

V.

Assignments impugning the rule of res adjudicata *as laid down by Wallace, J., in the Circuit Court of Appeals, followed under constraint by Judge Lacombe at final hearing, and sustaining the rule as applied by Wheeler, J., upon the hearing of the demurrers. The pleas were set down for argument upon exceptions to their validity and were sustained in harmony with Judge Wallace's opinion. These assignments insist upon those exceptions* (Vol. IV., pp. 788 to 809).

Thirteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York, in the suit of Amherst College against Ritch, entered December 31st, 1894, adjudges or concludes the matters and things

in the said complainants' amended original bill alleged; and all, every, or any of them.

Fourteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York, in the suit of Amherst College *et al.* against Ritch *et als.*, entered December 30th, 1895, adjudges or concludes the matters or things in the said complainants' amended original bill alleged; and all, every, or any of them.

Fifteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York in the suit of Amherst College *et al.* against Ritch *et als.*, entered March 10th, 1897, *adjudges and concludes* the matters or things in the said cross bill alleged; and all, every, or any of them.

Sixteenth.—In that said Court decided, and it is decreed, that the judgment of the Supreme Court of the State of New York, in the suit of the Trustees of Amherst College *et al.* against Ritch *et als.*, entered July 6th, 1897, *adjudges or concludes* the matter or things, alleged in the said cross-bill, and all, every, or any of them.

Seventeenth.—In that said Court decided, and it is decreed, that the judgment and order of the Court of Appeals in the suit of the Trustees of Amherst College *et al.* against Ritch *et als.*, entered March 9th, 1897, *adjudges or concludes* the matters or things in said cross-bill alleged; and all, every, or any of them.

Eighteenth.—In that said Court decided, and it

is decreed, that the judgments and order aforesaid *collectively adjudge or conclude* the matters or things in the said complainants' amended original bill alleged ; and all, every, or any of them.

Forty-sixth.—In that the decree should have been in favor of the complainants and against the defendants, and each of them interposing pleas upon the sufficiency of their pleas to bar the matters alleged in the amended original bill, or any of them.

Fifty-first.—In that said Circuit Court decided that the issues presented by the amendment to the original bill, made no essential change, as against the pleas, from the issues presented by the original bill before amendment.

Fifty-fourth.—In that the said Circuit Court held that the matters adjudged by the State Court, or any of them, in the case of the Trustees of Amherst College against Ritch, were the same matters presented by the amended. original bill.

Sixty.—In that said Circuit Court held that by the judgment in the case of the Trustees of Amherst College against Ritch, the validity of the releases attacked and asserted by the pleas, as against the allegations of the amended, original bill, had been adjudicated, sustained, passed upon, or considered, by the State Court.

Sixty-second.—In that said Circuit Court held that the releases attacked by the amended, original bill, were a bar thereto, if valid.

VI.

Assignments relating to the determination that the releases were any bar to complainants' case, even if the judgment pleaded adjudged them to be valid upon the facts then disclosed (Vol. IV, pp. 804 to 809).

Forty-fifth.—In that the decree should have been in favor of the complainants and against the defendants interposing pleas and each of them, upon the truth of their pleas.

Fifty-fifth.—In that said Circuit Court held that the releases alleged in the pleas were available as a bar to the prayer of complainants, upon allegations impeaching the capacity of the persons to whom said releases ran.

Fifty-seventh.—In that said Circuit Court held that the releases of the complainants were authorized, or pursued the authority under which they purport to have been executed; and held that, by the estoppel of the judgment in the case of Amherst *v.* Ritch, the evidence taken therein, of facts theretofore unknown to, and, by the contrivance of the defendants, fraudulently concealed from the complainants that the person who signed the releases under the said authority was corrupted by the defendants and induced to betray the interests of said complainants, and to abuse his said authority; could have no effect herein.

Fifty-eighth.—In that said Circuit Court held that the allegations of the original, amended bill, and the proof in support thereof impeaching the probate of the will under which the defendants

claimed, do not amount to and were not based upon a new title or newly-discovered evidence, available in this cause, notwithstanding any adjudication, either by the decree of probate or the judgment in the case of the Trustees of Amherst College against Ritch.

Fifty-ninth.—In that said Circuit Court held that the allegations of the amended, original bill, impeaching the releases set up by the defendants, and the proofs in support thereof, do not amount to, and were not based upon, a new title or newly-discovered evidence, available in this cause, notwithstanding any adjudication, either by the decree of probate or the judgments in the case of the Trustees of Amherst College against Ritch.

Sixty-first.—In that said Circuit Court held that the releases attacked by the amended, original bill were valid.

VII.

Assignments relating to the proceedings whereby complainants were deprived of a disclosure of the contents of the Fourth codicil, executed Nov. 11th, 1890, destroyed by Vaughan (Vol. IV, p. 805).

Forty-seventh.—In that the Circuit Court held the proceedings upon the appeal of the witness, Prescott Hall Butler, whereby the decision of the Circuit Court, requiring said witness to answer concerning the contents of the codicil drawn by him, was reversed by the Circuit Court of Appeals, to be valid and binding upon said Circuit Court; whereas said proceedings were unauthorized by law; and without jurisdiction.

Forty-eighth.—In that said Circuit Court held that its decision and order determining that the witness, Prescott Hall Butler, was in contempt for his refusal to answer the questions propounded to him, respecting the contents of a certain codicil to the will of Daniel B. Fayerweather, drawn by said Butler, and unlawfully destroyed, by the defendant, Vaughan—was lawfully or effectively reversed by the mandate of the Circuit Court of Appeals, made upon a writ of error sued out by said Butler; inasmuch as said writ of error was null, void, and of no force or effect; and the said mandate was not issued in pursuance of any jurisdiction, power, or authority.

I.

Assignments against the determination concerning the jurisdiction of the Circuit Court over the controversy as effecting probate and wills.

The law of the case was, in this respect, first decided upon the Fiero cross bill. The cross bill filed by Fiero (Vol. I, p. 328), after making answer to the Reynolds cross bill (Vol. I, p. 340), which brought him in as a defendant, set forth the proceedings previously had and the condition of the cause as correct practice requires, and then alleged in substance, as follows:

The testimony taken in the cause has informed this defendant, for the first time, of the existence of essential facts sustaining the grievance and rights in this cross bill set up, which were previously unknown. He was an executor under a

will of Fayerweather made in 1880 (Vol. IV, 213), which is in the possession of the defendant Ritch, uncancelled and unrevoked, unless it has been lost or destroyed, in which case he prays that due proof thereof as a lost will may be taken, and that it shall be by decree herein established. He further alleges that, in case that will cannot be established for any reason, the last will of said Fayerweather was one, executed in 1878, of which he was executor, and of which he makes profert (Vol. IV, p. 302). The other executors named in these wills, except the defendant Bulkley, are dead. The defendants, Ritch, Bulkley and Vaughan, have procured probate by specified decrees of the New York Surrogate of a will of 1884 and four codicils, under color of which they have taken possession of the entire estate, and have either paid it away to the other defendants or have it still in their possession, control or power. He was first informed by the testimony adduced herein, and did not previously know, the facts therein set forth to impeach that probate and those testamentary papers. He charges that said decrees were obtained by the suppression of facts, untrue representation of facts, contrivances, devices, imposition practiced upon the Surrogate, and other improper means thereinafter set forth, so that the decreee ought to be annulled, vacated and set aside and the parties hereto forever enjoined from setting them or either of them up, or claiming any right, title or advantage under them.

By the codicil executed November 11th, 1890, Fayerweather had cancelled the testamentary papers except the wills of 1878 and 1880. The paper probated as a codicil executed November 15, 1890, whereby the will of 1884 and four codicils

were in form reaffirmed and republished, was not the act of Fayerweather, but was made when he was comatose and dying, and incapable of understanding the nature or effect of said paper. He had given instructions which were reduced to writing, and which remained in the exclusive possession of said defendants, unknown to the other parties to the probate proceeding, for the preparation of a codicil of a purport and effect wholly different from, and in conflict with, said paper proved as such, and he was awaiting its preparation in conformity with his directions; but the defendants took advantage of the access to him which they obtained upon the pretence of bringing for execution a codicil in accordance with his directions, and also took advantage of the fact that he had then passed beyond the condition of testamentary competency to obtain his signature to said paper so probated as a codicil of November 15th, 1890, compelling and guiding his unconscious hand to hold a pen which was in the control, and represented the mental act and will of a clerk, acting by the procurement and at the instigation of the defendants, and thereby put his name to said codicil to effectuate their will, and not that of said Fayerweather.

The apparent effect of said codicil was to give absolutely to said defendants upwards of $3,000,000. Not only did the said defendants withhold and conceal from said Surrogate the circumstances aforesaid actually attending the execution of said paper, and the divergence between said codicil and the instructions therefor; but they withheld and concealed from said Surrogate and from the parties to said proceeding, some of whom were opposing the said probate, the fact of the existence and contents of said writing wherein said instructions were

as aforesaid, set down, while at the same time they were holding out and pretending to said Surrogate and said parties, that they were making and had made full disclosure of all the circumstances of the execution of said paper, and all writings having any relevancy in the premises, and thereby procuring the inaction and nullifying the opposition of the other parties.

If circumstances which were proved before the Surrogate in said proceeding, tending to show that the said paper of November 15th, 1890, was not the free and conscious act of said Daniel B. Fayerweather, had been illuminated and further confirmed by the facts so suppressed, and by the conflict shown by said writing, between the codicil and the instructions, which were the occasion for any codicil then to be executed, and had appeared by the disclosure of said instructions and the production of said writing, it would have appeared that the said codicil was unduly procured by the defendants, and actively by the defendant Henry B. Vaughan, while he was in a position of confidence towards said Daniel B. Fayerweather, while he controlled his household, while he was receiving unthinking compliance on the part of said Fayerweather and his household with every request which said Vaughan made, while he was scheming to benefit himself by seizing upon these circumstances to obtain the signature of said dying man to a gift to said Vaughan of over $1,000,000, so far as he was concerned; and so far as the said three defendants, executors, were concerned, the procurement of said signature to said paper having the effect to reinstate them as executors, from which places they had been displaced by said instrument executed November 11th, 1890, and to

give them the commissions, benefits and advantages arising from that relation to an estate of upwards of $6,000,000, and to enable them to claim $3,000,000 thereof as their own, then and in that case, your orator charges, the said decrees establishing said will and codicils should not and would not have been made. Your orator further charges and alleges that by the purport and effect of said will of 1884 more than $3,000,000, the excess of one-half of the estate of which said Daniel B. Fayerweather died possessed after the payment of his debts, was devised and given to corporations and institutions in disregard and violation of Chapter 360 of the laws of the State of New York, passed in 1860, to wit, to benevolent, charitable, literary, scientific, religious and missionary societies, associations and corporations, the said Daniel B. Fayerweather having a wife him surviving; and the said Fayerweather, when he executed the will of 1884, was clearly advised and well knew that the said devises were in conflict, to the extent of one-half thereof, with said statute, and that at the suit of his said wife and the defendants Emma S. Fayerweather, Mary W. Achter and Lucy J. Beardsley, who were nieces of said Fayerweather, or either of them, a court of competent jurisdiction could and would declare and adjudge that such devises were so illegal and null, and that said wife and next-of-kin were entitled to distributive shares of so much of said estate as should exceed one-half of such devises, under the statute of the State of New York, as in case of intestacy.

But said Daniel B. Fayerweather, desiring notwithstanding said statute to make effectual said devises, and with the purpose of accomplishing his desire *by a method which would defeat the statute*

and conceal its violation, and in order to defeat, hinder and delay said wife and said next-of-kin in any effort to set up and sustain the prescription of said statute, by concert and agreement with defendant Thomas G. Ritch, executed the said will of 1884, with the understanding that after the expiration of sixty days, the time which he believed by force of the statute of the State of New York the devises to such corporations and societies in said will made must have been existent in order to take effect even in part, he would dispose of his estate in excess of one-half by the form of a codicil devising it absolutely to his executors or some of them, upon a secret trust, which the said Ritch agreed to, for himself and the defendant Bulkley, whereby they should conceal and deny that any trust existed and that the devises to them were not in fact, as they were in form, absolute, but should nevertheless, be transfers and conveyances in the exercise of the legal title so conferred upon them, make the same disposition of the estate as the said will of 1884 directed upon its face.

In pursuance of this concert and agreement and to effectuate it, the paper aforesaid, executed December 13th, 1884, which made such agreed disposition, was made and published. The said probate papers, other than said will and codicil of November 15th, 1890, executed by said Daniel B. Fayerweather subsequently to December 13th, 1884, were only incidents to the will of 1884, and would not have been made but as incident thereto; and unless the said will is valid, are null and void.

The said Fayerweather died on the 15th day of November, 1890, in the City of New York.

Thereupon to effectuate said concert and agree-

ment said defendants Ritch, Bulkley and Vaughan, for a time held out that they held said estate in their own right as absolute devisees, to the extent of one-half thereof, and they withheld from the Surrogate and from the parties to the proceedings before him upon the probate aforesaid, the facts aforesaid and the proofs thereof which were in their exclusive power and control, and they then and there denied that they held said estate or any part thereof subject to said trust or secret agreement, and thereby and otherwise, as hereinabove set forth they obtained the probate of said testamentary papers, and the decrees aforesaid; whereas, *had the said facts been disclosed, said scheme including said will and codicils, would have appeared to be, as they were, null and void, as an imposition upon the statute of wills, and an attempt to use the forms of that statute to defeat its substance and to conceal its violation;* and *your orator charges that said probate so obtained should for the reason aforesaid be annulled and the parties hereto enjoined from setting up or taking any advantage from said decrees, and that the said will of 1880, or, in the alternative, that of 1878, be established* as the last Will and Testament of said Daniel B. Fayerweather, *in so far as it may, under said statute of wills,* be established, and *that, as to the residuum, the estate be decreed to be disposed of as in case of intestacy.*

Wherefore, your orator prays that he may have the relief aforesaid and such other and general relief as may be equitable; *that the several defendants be required to account for such moneys and property as they or any of them may have received constituting the estate of said* Daniel B. Fayerweather, and required to pay the same over to your

orator, as executor of the will established; that the rights of the several parties to distribution of said estate be settled by decree herein; that it be adjudged that your orator is the sole, qualified executor of the last will and testament of Daniel B. Fayerweather and is entitled to exercise all power conferred by said will and by law, and to have the benefit of such commissions and advantages as appertaining to such executorship; and that he may have an injunction against the defendants to command them not to dispose of, alienate, convey or transfer any of the property aforesaid, and not to remove any such property out of the jurisdiction of this court; and that this court reserve the power to make such further directions at the foot of its decree as may be useful, convenient or necessary for its enforcement.

In the answer of Fiero to the Reynolds cross bill filed with Fiero's cross bill (Vol. I, page 340),

He admits and says that it is true to the best of his knowledge, information and belief. Except that he is informed and believes that it is *not* true and therefore he *denies* that it was not the intention of Daniel B. Fayerweather to make any such will, as alleged in said cross-bill, and that he did not understand the same or the first three codicils thereto, or their legal effect, and that he relied upon the advice and representations of the defendant Thomas G. Ritch, with the discretion conferred on said Ritch by said will and devise to make of the residuary estate *was a lawful mode of effectuating the wishes of said Daniel B. Fayerweather*, and that said Fayerweather was defrauded in so far that he was ignorant that the provisions aforesaid were void in violation of the statute; but on the contrary

thereto your orator answers upon information and belief that said Daniel B. Fayerweather well knew that said provisions were in violation of said statute and that the same would be adjudged void if the truth in respect thereto should be disclosed, and that he made said will and said codicils with the intention not only to effectuate the said wishes in despite of the statute, but to conceal the violation by the mode described in the said cross-bill and the secret trust to which the title by him conferred in said codicil should be actually subjected.

A motion was made by the defendants, here appellees (Vol. 1, p. 343) for an order herein removing and striking out from the files of this Court the cross-bill filed by Joshua M. Fiero, upon the following grounds:

First.—That no order of this Court has ever been made authorizing or permitting the same to be filed or served.

Second.—That it was filed by a person who is not a defendant to the original bill in equity pending in this cause.

Third.—That the subject-matter of the cross-bill is not the same as the subject-matter of the original bill.

Fourth.—That it introduces new and distinct matters not embraced in the original bill.

Fifth.—That it is not auxiliary and ancillary to the proceedings in the original bill, and a dependency of it.

Sixth.—That it introduces new parties not introduced into the cause by the original cross-bill.

Seventh.—That the cross-bill is not a cross bill and is not germane to the original bill; for such other order and relief as may be just.

This motion was disposed of by an order (Vol. I, p. 245) in the terms following:

ORDERED, that said cross-bill of said Joshua M. Fiero be and the same is dismissed and stricken from the files of this Court *upon the sole ground* that this Court has no jurisdiction to grant the relief prayed for in the said cross-bill or any part of said relief.

It is unnecessary now to show that the Fiero cross-bill was a true cross-bill, or that he was properly added by the Reynolds cross-bill to the parties. If he were here appellant, these considerations might demand attention.

The importance to the appellants here of the Fiero ruling is to show that, before the final decree, the Judge below had decided as the law of this case that the Circuit Court had no jurisdiction to do what Fiero prayed should be done, upon a case made on the equity of which no question was or could be made against the sufficiency of the bill to set aside the probate and the will and to establish the earlier will, or as between the parties, to administer the estate as intestate, with the resultant relief.

The question of jurisdiction thus raised controlled the disposition of the amended bill of complainants and the cross-bill of Reynolds, so far as the probate and wills were involved. Both sought similar, although not identical relief, upon a similar although not identical state of facts. The Court below has removed all doubt that the question is before this Court, if any there be, by its allowance of the appeal certifying that the assignments speci-

fied present the question of jurisdiction as it arose and was decided in the cause.

It will therefore be in order to show the *status* of the probate features of the case in New York, what relief from such a state of facts can be given only by the probate jurisdiction and what may be given by the Court of general, chancery jurisdiction; how far the remedy sought is properly a mere extension of the original probate jurisdiction, and how far it comes within the general powers of the N. Y. Supreme Court in a suit *inter partes*. Because, as we shall hope to convince this Court, in so far as a suit for the relief sought is entertained by the New York Supreme Court, as distinguished from the Surrogate's Court, the Circuit Court has jurisdiction to go, in this suit resting upon diverse citizenship.

It is contended that all matters *inter partes*, which may under State laws be the subject of adversary, judicial contest, in whatever form and in whatever *forum*, relating to testamentary acts, may, where diverse citizenship exists, be judicially determined in the Circuit Court held in such State. It is further contended that the forms and distribution of such remedies in the State Courts are disregarded in the Circuit Courts; and, where by reason of the nature of the controversy it falls within the scope of equity functions, the general chancery procedure may be invoked to supplement or effectuate the local, statute remedy.

Cowley *v.* Northern Pacific Railroad Co., 159 U. S., 569, pp. 577–583.

Arrowsmith *v.* Gleason, 129 U. S., 86, pp. 98–101.

Johnson *v.* Waters, 111 U. S., 640, pp. 667, 668.

Ellis *v.* Davis, 109 U. S., 485, pp. 494–503.
Barrow *v.* Hunton, 99 U. S., 80, pp. 82–85.
Gaines *v.* Fuentes, 92 U. S., 10, pp. 20, 22, 25, 26.
Gaines *v.* Hennen, 24 How., 553, p. 565.
Hess *v.* Reynolds, 113 U. S., 73, pp. 77–79, 80.
Boom Co. *v.* Patterson, 98 U. S., 403, p. 407.
Chicot Co. *v.* Sherwood, 148 U. S., 529, pp. 531–534.
Clark *v.* Bever, 139 U. S., 96, pp. 101–103.
Bardon *v.* Land &c. Co., 157 U. S., 327, p. 330.
Steamboat Company *v.* Chase, 16 Wall., 522, pp. 533, 534.
Sherlock *v.* Alling, 93 U. S., pp. 104, 105.
Ex parte Gordon, 104 U. S., pp. 516, 517, 519.
Smythe *v.* Ames, 169 U. S., 466, pp. 516, 517.
Central Nat. Bank *v.* Fitzgerald, 94 Fed. R., 16, 19.
Williams *v.* Crabb, 54 C. C. A., 213.
Sawyer *v.* White, 58 C. C. A., 591.

The case of Broderick's Will, 21 Wall., 503, has been repeatedly distinguished in many of the cases above cited; and, indeed, contains a recognition of the principle, where statutory provisions exist for the attack upon the probate. See pages 519, 520.

BY THE STATUTORY LAW OF NEW YORK PROVISION FOR THE ATTACK UPON THE PROBATE HERE MADE IS FOUND IN SECTION 2481, SUBD. 6, OF THE CODE OF CIVIL PROCEDURE.

"By Section 2 of the Code, a surrogate's court is a court of record.

"By Section 2481, a surrogate, in court or out of court, as the case requires, has power: * * * subd. 6:

"To open, vacate, modify or set aside or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the same manner, as a court of record and of general jurisdiction exercises the same powers."

This provision, while it embraces vices in form, and to that extent regulates a mere continuation of the original proceedings; also provides for a separate, substantive, special proceeding, tantamount to a bill in equity to set aside a decree for fraud in the procurement thereof.

In that aspect it has all the characteristics, incidents and effects of a suit *inter partes*, in Court.

Matter of Tilden, 98 N. Y., pp. 441-444.

Matter of Hawley, 100 N. Y., pp. 210, 212.

Hoyt *v* Hoyt, 112 N. Y., pp. 507, 508.

So that the Surrogate's Court has such power in a suit *inter partes*. But so has the N. Y. Supreme Court, under the special circumstances of this case.

The *gravamen* of the second ground of relief thus set up by complainants in the am ended bill and by Reynolds in his cross bill, is a case and cause for which a court of record and of general jurisdiction exercises the power to open, vacate and set aside a degree and grant a new trial or hearing for fraud, newly discovered evidence or other sufficient cause.

The bill charges a meditated and intentional contrivance to keep the next-of-kin and widow of Mr. Fayerweather in ignorance of the real facts in the case and to obtain the decrees by such contrivance. It presents just such a case as was held sufficient to compel the defendan t to go into the probate court and consent to revocation of probate in

Barnsley *v.* Powel, 1 Ves., 284.

In that case a recognized exception to the general rule was presented. The case made by the bill there was that of an executor procuring probate of a forged will by fraudulently inducing the testator's widow, the person most directed interested, to execute a consent to its probate. Lord Hardwicke sustained the bill and compelled the executor to consent in the Ecclesiastical Court to a revocation of probate.

The case made is within the principles laid down in the following authorities.

State of Michigan *v* Phœnix Bank, 33 N. Y., pp. 23—8.

Ross *v.* Wood, 70 N. Y. pp. 10-12.

Verplanck *v* Van Buren, 76 N. Y., pp. 258-260.

Ward *v* Town of Southfield, 102 N. Y., p. 293.

The circumstances alleged, not denied (and proved in the case against Hamilton College), establish that the dying day codicil was not the act of the decedent. It added Vaughan to the devisees of the residuary estate. It restored the defendant Ritch, as executor, although the codicil drawn by Mr. Butler, illegally destroyed by Vaughan, was chiefly drawn to, and did, displace him.

This codicil, however, is not yet disclose with sufficient detail to enable the Court to establish it as a destroyed will, conformity with section section 1861 of the Code, and discovery thereof was needed and sought.

BY THE STATUTORY LAW OF NEW YORK PROVISION FOR THE ESTABLISHMENT OF THE DESTROYED OR LOST CODICIL OF NOVEMBER 11, 1890, IS FOUND IN SECTION 1861 OF THE CODE OF CIVIL PROCEDURE.

SEC. 1861. An action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof, in either of the following cases:

1. Where a will of real or personal property, or both, has been executed, in such manner and under such circumstances, that it might, under the laws of the State, be admitted to probate in a surrogate's court; but the original will has been lost or destroyed, by accident or design, before it was duly proved and recorded within the State. The jurisdiction in such cases was asserted by this Court in Gaines *v.* Hennen, 24 How., p. 561.

THE JURISDICTION OF THIS COURT TO GRANT DISCOVERY IN AID OF THE ESTABLISHMENT OF A

WILL IS ONE OF ESTABLISHED CHANCERY COGNIZANCE.

Story Eq. Jur., Sec. 534.
Chipman *v.* Montgomery, 63 N. Y., p. 236.

THE JURISDICTION OF THIS COURT TO DECREE THE INVALIDITY OF THE RELEASES AND THE CONCOMITANT AGREEMENTS AS IMPEDIMENTS IN THE WAY OF ATTACK UPON THE PROBATE, RESTS UPON ESTABLISHED PRINCIPLES OF EQUITY. The Surrogate's Court in New York has no chancery power, and the releases would there bar jurisdiction. It is for that reason settled in New York, that the N. Y. Supreme Court has jurisdiction to relieve from the releases and retain the cause for full relief, not sending the parties back to the Surrogate.

Sanders *v.* Soutter, 126 N. Y., 193.

The facts thus admitted, OR not effectively denied, suffice to justify the proceedings prescribed by Section 2481, subdivision 6, in the Surrogate's Court.

It is necessary to avoid the releases and their concomitant agreements in equity.

It will be perceived that a feature of these agreements is the undertaking not to sue to set aside said will and codicils or either of them (Vol. IV, p. 208). It is evident that these agreements are fair on their face and require extrinsic evidence to assail them. They are a bar to any petition under Section 2481, Subd. 6, of the Code, in the Surrogate's Court. That court has no power to set aside the agreements

which must be avoided by a court of equity, as a prerequisite to any such petition. In that respect the separation of jurisdiction is as complete as in any case in this court, between remedies at law or in equity.

Matter of Randall, 152 N. Y., 508, pp. 513, 519, 520.
Matter of Pruyn, 141 N. Y., 544.
Matter of Monroe, 142 N. Y., 484.

A peculiar case is thus presented such as is sustained, notwithstanding the general rule, for the interposition of chancery.

Sanders *v.* Soutter, 126 N. Y., 193, pp. 196, 197, 199, 200.
Mellen *v.* Mellen, 139 N. Y., p. 219.
Broderick's Will., 21 Wall, p. 510.
Barnesley *v.* Powel, 1 Ves., 284.
United States *v.* Wilson, 118 U. S., p. 89.

The Court acquiring jurisdiction for that purpose may proceed to administer complete relief.

Cowley *v.* Northern Pac. R. Co., 159 U. S., pp. 581, 582.
Sanders *v.* Soutter, 126 N. Y., 193, p. 201.

Another distinct ground for the probate features of the bill here is the need for discovery. The contention is that the probated testamentary papers assailed under Section 2481, Subd. 6, being set aside, there is a codicil (that one drawn by Mr. Butler), destroyed unlawfully, which

may be established by action, pursuant to the Code, Section 1861.

This relief can only be had upon discovery which is here sought from the defendant Vaughan, who destroyed the codicil; and from any others who can disclose its contents.

> Story Eq. Jur., Sec. 534.
> Chipman v. Montgomery, 63 N. Y., foot of p. 235.

It is quite certain that to establish the destroyed codicil its substance must be disclosed.

> Mandeville v. Reynolds, 68 N. Y., p. 536.

What is the effect of the ascertainment of the allegations in the Piero cross bill, that the wills of 1878 and 1880 are openly in conflict with the statute of wills of 1860?

The statute answers the question: one of those wills is valid, except as to the one-half in excess of the permitted devise to institutions.

But what is the effect of a deliberate violation of the statute, accompanied by a design and also by an inseparable plan to conceal the violation? The established result of all that has past, so far as it establishes anything, is that Ritch showed Mr. Fayerweather how to violate the statute. Ritch undertook to aid him in its violation; Ritch became the chief instrument in the unlawful plan. He attempted, by the concerted course of procedure, to commit a fraud on the statute. The violation of the statute is not a fraud upon it, because the statute prescribes the consequences and the testator consents to accept those consequences when he frankly and openly makes his will that way. But when he

adds to that the misleading pretence that he is doing what the law permits, only to conceal the violation, does he not subject his will to the total condemnation of the law? The scheme adopted necessarily involved a fraud upon every court which should be asked to give effect to it.

"Oh, what a tangled web we weave,
When first we practice to deceive."

They were confronted at the outset with the problem thus stated by Ritch (Vol. VI, p. 878; Surrogate's *Record.*)

"Q. What other object was there (in the plan of the residuary devise)? A. In my talks with Mr. Fayerweather about his matters, the health of his wife, matters connected with his family, the possibility that, if his matters were in such shape, that *there would be no inducement for her relatives to bother.* All these things had been, in the course of talking about the will, considered."

It was inevitable if the concert were to be made effectual, that the deceitful testament should be made to deceive. The unlawful scheme to defraud the statute must be made operative by every deceit called for in its progress. It was an undertaking to mislead the next-of-kin, and what happened, to secure the agreements and releases, is what was inevitably to be looked for, as an incident of the enterprise. When Ritch verified the petition in the collateral inheritance tax proceeding, did he swear to the truth? When he and Vaughan repeatedly deposed in in the Surrogate's Court against the existence of the secret trust, did they tell the truth? When they verified answers in the Five College action denying in gross and in fine that there was any secret trust, did they know-

ingly swear falsely to a material fact? The verity of the judgment which they here assert, as a bar to any inquiry into any of the monstrous array of facts here adduced for judicial action, involves, beyond all escape the conclusion that the representations on the faith whereof they obtained the agreement not to contest the probate and the releases, were necessarily false, that they had made a bargain to give effect to the fraud on the statute by further frauds in the very Temple of Justice. To suppose for a moment that they could perform their contract with Mr. Fayerweather and not commit a fraud upon the next-of-kin, aided by fraud on the law, and perjury, is to confuse and destroy all sane thinking.

The deduction inevitably is that the whole testamentary scheme so tainted is not, when detected and exposed, protected as to one-half by the statute thus defrauded; but is wholly void and results in total intestacy, unless one of the earlier wills shall be established.

That the Circuit Court has jurisdiction to entertain these proofs and contentions results from the authorities above cited.

Another fact which impugns the dying day codicil, is the utter departure from the instructions for it first disclosed by Vaughan in the trial of the Five College action, and the withholding of the Exhibit Oa, upon which those instructions were written at the will contest.

The facts are as follows:

Mr. John E. Parsons came into the will contest while there was pending an application to compel the disclosure of all writings in the possession of the executors propounding the will and codicils, having any bearing thereupon (Vol. II, pp. 222 to 225, 331). He testified:

I was not employed in the probate contest at the beginning. When I became employed there was pending a question of what should be done upon some request which had been made by Mr. Coudert for any memoranda of Mr. Fayerweather's or correspondence, and on the first occasion that I saw Mr. Coudert, or at the beginning of my relation to the contest, I told Mr. Coudert that if there were any papers or memoranda of the kind referred to which he desired to see or to have and of which he would let me know, I thought he was entitled to receive them, and that I would do what I could to see his wish complied with. I think that at that time there was pending a motion for a discovery, at all events some proceeding, the details of which are not clearly in my mind; I do not think that I was connected with the contest when that proceeding took place; and my general recollection would be that it was then that that occurred, my conversation with Mr. Coudert.

My recollection is that the motion, if there were a motion, or that whatever had occurred in respect to the discovery, was prior to the time that I was retained, and that succeeding my retainer, I had a conference with Mr. Ritch and that the outcome of that was that these memoranda and writings were furnished to Mr. Coudert.

All I know is that it led to a consideration of whether the executors might comply with Mr. Coudert's wish, and that wish had been signified in some way prior to my connection with the case.

225 Q. Then there was no obstacle opposed to the submission to Mr. Coudert of Exhibit OA arising out of any consideration of privilege, was there?

A. Exhibit OA did not come within the designation of of memoranda of Mr. Fayerweather's or cor-

respondence between him and any one, and if my memory serves me correctly it was not until long after this that I saw the note and the envelope subsequently marked Exhibit OA which enclosed it. The envelope was not evidence of any kind in the recollection that I have of it; it was unintelligible, and it only stated a memorandum of a conversation between Mr. Fayerweather and Mr. Vaughan, which conversation was testified to by Mr. Vaughan upon the probate trial, and, if I am correct in my recollection, and in this respect my recollection is refreshed by what Mr. Sherman has heretorore said, both Mr. Coudert and I inquired of Mr. Vaughan in respect of that conversation, I for one reason and Mr. Coudert probably for a different reason.

226 Q. And the version which you elicited from Mr. Vaughan in the Surrogate's contest was one intended by you to embarrass the attempt then being made to impose upon the title of the executors a secret trust by evidence tending to show that the trust was too indefinite to be carried out in accordance with the rule held upon Tilden's will and in accordance with the contention which you made in respect of the Edison will, was it not?

A. No; and in saying no I do not mean to acquiesce in the propositions of the question.

227 Q. Although you say that the Exhibit OA is by itself meaningless, you well know, do you not, that if that document had been submitted to Mr. Coudert it would have led to inquiry from you as to the circumstances under which it was made, and that upon that inquiry Mr. Coudert would have learned that these apparently meaningless pencil memoranda on Exhibit OA consisted of instructions taken from Mr. Fayerweather by Mr.

Vaughan on the morning of November 15th, 1890, for the preparation of a codicil to be executed that day, and which circumstance would be entirely in conflict with the version which you elicited from Mr. Vaughan that this conversation about more institutions for benefit occurred *on the afternoon and after the execution of the codicil.* Is it not so?

A. How is it possible for me to tell what Mr. Coudert would have done under any given condition or circumstances. Mr. Coudert upon the probate trial asked Mr. Vaughan about that conversation; I can guess that if anything had called his attention to the conversation he might have asked about it; if he did do so he would have learned so far as I have any knowledge *what Mr. Vaughan stated upon the probate trial* whether the conversation referred to was at one time or other of the interview of November 15, 1890. I do not know and I cannot at this moment remember what was said upon the subject. Any materiality in the view which I entertained then and entertain now about that conversation was first its bearing upon the mental condition of Mr. Fayerweather at the time. The contestants before the Surrogate, the widow and next-of-kin, had filed objections stating that he was incompetent, etc. Its other bearing was in answer to the claim made by the colleges and by Mr. Reynolds as executor; it was that there was a secret trust in favor of colleges, and that Mr. Fayerweather's wish was and that his wish down to his death was, that his residuary estate should go to the colleges named in the will with one or two exceptions, I think Lincoln University or some other college was one.

228 Q. Hampden?

A. Well, perhaps Hampden. I thought upon trial before Judge Truax that what passed between Mr. Vaughan and Mr. Fayerweather on November 15, 1890, whether at one hour of the day or another, met this claim of the colleges and Mr. Reynolds and I tried my best, and in the end I think that I succeeded in getting in evidence all that conversation; and I make that to overcome objections made by Mr. Reynolds and the colleges through their counsel I was compelled first to get in the memorandum, the effort of the colleges and Mr. Reynolds being to exclude Mr. Vaughan's testimony on the ground that Mr. Fayerweather was dead. With reference to the barring of that conversation and whether it did or did not constitute instructions for the codicil of that date, I recall that the position upon the Truax trial taken adverse to the executors was that that conversation did not constitute and was not intended by Mr. Fayerweather to constitute instructions for the codicil of that date, but it constituted instructions for the preparation of a future codicil, the execution of which was prevented by Mr. Fayerweather's death. I remember distinctly that Mr. Root took that position, Mr. Root at that time apparently was co-operating with Colonel James, they were apparently making common cause against the executors, and I have a sort of impression that Colonel James took the same position specifically; about that I will not be so sure.

237 Q. Between the time when Mr. Vaughan testified in the Surrogate's contest, and the time when in the Five College action you introduced the subject of Exhibit OA and the attendant conversation, did you receive other and different information about it than you had at the time Mr. Vaughan was examined in the Surrogate's contest?

A. This question, if I understand it correctly, calls upon me to testify what passed between my client, Mr. Vanghan, and myself, and meets an objection which has time and again been taken during this examination by the counsel who puts the question. I do not take such an objection because I know Mr. Vaughan well enough to be satisfied that he would not ask me to abstain from answering the question, and relying upon his assumed assent I state that I have no recollection that any information came to me upon the subject from the time of the probate trial down to the time of the trial before Judge Truax. The only source from which information could come was Mr. Vaughan, and I do not remember that I had any conversation with him upon the subject. I had the probate record before me or in my possession.

275 Q. Are you positive that Mr. Coudert's request was not in terms broad enough to embrace the request for the production of the paper which has been marked Exhibit OA in the Truax trial?

A. I have no recollection that it is broad enough to indicate any such idea to me. The memorandum was not a writing by Mr. Fayerweather or a writing of materiality of any kind so far as I then unuerstood and understand now, except in so far as it might refresh Mr. Vaughan's recollection or corroborate his recollection if it were disputed. If Mr. Coudert asked me about Mr Vaughan's conversation on Novomber 15th, 1890, with Mr. Fayerweather and I knew about it at that time I certainly told him, but I have no recollection that such was the case.

276 Q. If, as Mr. Vaughan testified, the memorandum was taken down as the substance of instructions given by Mr. Fayerweather on the morning

of November 15th, 1890, for a codicil to be prepared, and if therein Mr. Vaughan acted as agent for Mr. Fayerweather in order to communicate his wishes to a lawyer, was it not a purely verbal distinction which you made in withholding that paper from Mr. Coudert because the paper was not written by Mr. Fayerweather?

A. I do not know that Mr. Vaughan gave such testimony as the question assumes. The counsel apparently has the record before him and before answering the question I would like him to point out to me any such testimony by Mr. Vaughan.

282 Q. I call your attention to the Surrogates record at page 423 (Vol. VI):

"*Mr. Coudert.*—Shall I read that letter?

"*The Surrogate.*—Yes.

"*Mr. Coudert.*—(reading):

"Arnoux, Ritch & Woedford,

18 Wall St., N. Y., November 13, 1890.

"My dear Miss Joyce:

I have had two long talks with Mr. Vaughan Friday and yesterday and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. Fayerweather is too ill to be seen and so I would be glad to have you say to him if you think it well, that I will execute any papers, or say anything in your presence, or in that of any one else, that will enable him to feel his wishes will be carried out to the letter. It would be a misfortune indeed to me to lose his confidence after so many years through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested, and for the relatives and friends to whom he was attached, and

I knew that at the time the papers were drawn the reasons for each paragraph were known and approved by him, the object being to prevent any contest. I write this to you because you have known of Mr. Fayerweather's affairs and I believe that you as well as he believes that I have only tried to do my duty. If at any time you or Mr. Fayerweather want to see me I will call.

Sincerely yours,"

"That is signed by Mr. Ritch.

"*Mr. Parsons.*— I think you had better give Mr. Ritch's signature.

"*Mr. Coudert.*—It is signed Thomas G. Ritch. It is conceded all to be in Mr. Ritch's handwriting.

"*Mr. Parsons.*—Yes.

"Q. Mr. Ritch states in this letter of the 13th that he has had two long talks with you. A. I think that date is a mistake.

"Q. What do you think was the date? A. I think the letter must have been written on the 14th.

"*Mr. Coudert.*—Where is the envelope of this?

"*Mr. Arnoux.*—Mr. Ritch says that is correct, it was the 14th.

"*Mr. Parsons.*—It was the Friday."

282½ Q. Did not Mr. Coudert call upon you for that envelope in that way?

A. If what the counsel has read states what occurred Mr. Coudert did exactly what he appears to have done. Whether that states correctly what occurred I cannot tell from memory.

283 Q. Did Mr. Coudert ask "Where is the envelope of this?" in your hearing and while you

had in your possession in the Surrogate's Court the envelope which was afterwards marked OA?

A. I have exhausted my memory upon that subject. I have testified to all that I can recall. I have said that some question arose about a date, and that in some way the date was settled. The details I cannot recall; certainly not without reference to the stenographer's minutes.

284. Q. Did you look at the postmark on the envelope before you made the concession "It was the Friday?"

Mr. Bovee.—We object to it as irrelevant and immaterial to the issues here.

A. Probably not, because I do not suppose that a postmark would give a day. I think that there was some mistake about a date and that it was corrected by some statement of the narrative of occurrences or the sequence of occurrences, but upon that subject I do not care to rely upon my memory.

285 Q. Do you think that the postmark upon the envelope of a letter mailed in the City of New York and which letter purported to be dated November 13, 1890, but which it was contended was written on the 14th, would not indicate whether it had reached the post office on the 13th and thereby indicate whether it could or could not have been written on the 14th?

A. No.

286 Q. Did you make the concession that "it was the Friday," contrary to the fact in order to divert Mr. Coudert from his request for the envelope?

A. No. I do not know whether it was or was was not contrary to the fact, and I did nothing to divert Mr. Coudert's attention.

291 Q. When you say that all the evidence was received you do not mean that Exhibit AO was received in the Surrogate's contest, do you?

A. I would not call that evidence.

292 Q. Well, whatever you call it, that paper was not submitted to the operation of the mind of the Surrogate in any form, was it?

A. The conversation to which it related was submitted to the Surrogate in what I understood to be a complete form. If the question asks whether the memorandum was in evidence before the Surrogate, I have answered a great many times that it was not.

47 Q. Did you testify as a witness upon a reference before Mr. Dayton who was a referee appointed by the Surrogate in connection with the accounts of the executors under the will of Mr. Fayerweather?

A. I did.

49 Q. Was there a conference between yourself and Mr. Ritch and others, antecedent to this Surrogate's contest or during its pendency, the outcome of which conference was that all of the memoranda that were produced upon the Surrogate's trial and which subsequently were used on the trial before Judge Truax were sent to Mr. Coudert with a statement that it was not for them, the executors, by withholding information to endeavor to swerve the result of the litigation one way or the other, that their duty was to submit all the data of which they knew to anybody who desired and requested, and then to leave the responsibility of the probate contest or of any other contest that anybody might start upon the Court?

A. There was such a conversation so far as con-

cerns anything that had passed between Mr. Fayerweather and either of the executors and so far as concerned any memoranda or writings of Mr. Fayerweather; and so far as I know all *such* writings and memoranda were submitted to Mr. Coudert and were used in the litigation; whether all were used before the Surrogate or all were used before Judge Truax I cannot as a matter of memory recall.

50 Q. Was the envelope marked OA in the Five College action submitted to Mr. Coudert at any time while the Surrogate's contest was going on?

A. That was not a memorandum or writing of Mr. Fayerweather or a paper which had passed between him and any one, it was a memorandum of a conversation, and the conversation was testified to by Mr. Vaughan before the Surrogate. If the question asks whether the envelope was sent to Mr. Coudert, I assume not.

51 Q. You have no recollection that he ever saw it, have you before the settlement?

A. If you mean whether I have any present recollection, I have no present recollection upon the subject one way or the other. My inference would be that at that time—I mean the time of this conference—I was not apprised of the letter of Mr. Ritch to Miss Joyce, if that is the letter which the envelope contained; but even about that I cannot be perfectly clear in my recollection.

52 Q. Had not the letter of Mr. Ritch to Miss Joyce been produced by you and marked in evidence prior to the conference with Mr. Coudert which you had on or about April 30, 1891?

A. I cannot recall as a matter of memory.

53 Q. Did you have the envelope in your possession at any time while the Surrogate's contest was going on?

A. I can add nothing on that subject to what I have already testified.

65 Q. Upon your testifying before Mr. Dayton in the reference which commenced on the first day of November, 1895, and especially on or about the 26th day of December, 1895, were you asked these questions and did you make these answers:

"Q. Were you not aware at the time of that deed of gift that besides the will and codicils you refer to there were certain memoranda signed by Mr. Fayerweather and in the possession of one of these executors? A. I do not remember where the memoranda were or in whose possession, I know that one that I regarded as of the greatest importance was in my possession.

"Q. What one was that? There was a memoranda made by Mr. Vaughan in substantially the last interview that he had with Mr. Fayerweather, in which Mr. Fayerweather, according to my understanding, told him that so far as he, Mr. Fayerweather, had any wishes on the subject this residuary estate was to go to other institutions.

"Q. You mean by other institutions other than those on the face of the will and codicils? A. I mean exactly that."

A. As to dates I have no memory, as to exact questions and answers I have no exact memory. I can recall that before Mr. Dayton I did refer to the memorandum upon the envelope about more institutions for benefit, and inasmuch as I regarded the conversation upon that subject between Mr. Vaughan and Mr. Fayerweather as important, I may very easily have spoken about the memorandum on the envelope as important, and if the stenographer's minutes show that I said so, doubtless I did say so.

66 Q. Was the matter embodied in the last question true, *Mr.* Parsons?

A. The *matter*, what?

67 Q. The matter quoted.

A. It is impossible for me to answer a question of that kind. The matter referred to relates, among other things, to conversations between Mr. Vaughan and *Mr.* Fayerweather. Whether such a conversation occurred or not I do not know.

68 Q. So far as the matter embodied in those questions and answers refers to you, was that true? It was true, was it not?

A. You will have to read the passage.

69 Q. Here is the record, if you desire to refresh your memory by it.

A. No, I do not desire that. I think I remember it sufficiently, so far as my memory serves me at the present time, it is true; "important" is used in the passage incorporated into the question. The memorandum was important in so far as it might assist the memory of Mr. Vaughan or might corroborate his statement of what occurred between Mr. Fayerweather and himself on November 27, 1890.

70 Q. Did you testify before Mr. Dayton as follows:

"I will answer one branch of the inquiry further; I will make one further statement in answer to the inquiry, that is this, that from the beginning of my connection with the case down to now I have advised my clients that it was right that all concerned should have the possession of all evidence, written or oral, which could bear upon the determination of any of the questions which are at issue concerning Mr. Fayerweather's estate. The very so-called memoranda which were put in evidence

before the Surrogate were put in evidence as the result of a conference between Mr. Ritch and myself following a conference with the executors in which I took the position that it was not for them to determine what should be done with this estate, it was not for them to decide whether this will should or should not be proved, that was for the Court to determine when all of the evidence that anybody desired bearing upon the subject should be before the Court. Much of that evidence could have been withheld, much of the evidence which has been before the Court in the Amherst College suit could have been withheld, but the position which the counsel for the executors took at the start, and to which they have adhered to the end, was, that their relation to this controversy was of a trust character, that it was for them to give the Court all the facts which they knew for the Court to decide; and I defy anybody to point to anything from the beginning to the end of this litigation in the way of action on the part of counsel which is adverse to that view."

A. I cannot remember whether I gave that testimony, but I do recall that that was the position that was taken by myself in conferences from time to time, and I recall further that Mr. Coudert requested writings signed by Mr. Fayerweather or written by Mr. Fayerweather which had passed between him and Mr. Vaughan or Mr. Ritch, perhaps others. So far as I am able to recall they were all furnished to him.

71 Q. Do you mean by that to say that you have a positive recollection that he ever saw Exhibit OA before the settlement?

A. I do not. Exhibit OA was not a writing by Mr. Fayerweather nor by anybody, it was a very

brief memorandum relating to a conversation to which Mr. Vaughan testified before the Surrogate.

72 Q. Were you asked these questions and did you make these answers in your testimony before Mr. Dayton?:

"Q. The memorandum which you have described here, was it in relation to the codicil made on the dying day of Mr. Fayerweather? A. I have testified to that; the memorandum about other institutions to which I have referred was made on the day of the execution of the codicil by which these gentlemen take——

"Q. Was that the day on which Mr. Fayerweather died? A. My recollection is that that is the testimony. I was not there; how do I know?

"Q. You have said here to-day that all data necessary to reach a just conclusion was then laid before these gentlemen; and I ask you to find any time, any evidence, any place, any proof, that that fact was ever laid before them. A. I presume that the paper to which reference is made is the memorandum as to which I gave full testimony yesterday, a memorandum that *so far as Mr. Fayerweather had wishes* the residuary estate was to go to other institutions. *I attended with that memorandum myself, regarding it as of importance*, in court on the probate trial ready to produce it *if it were called* for by Mr. Coudert. There was some inquiry in reference to the envelope according to my present recollection *having some bearing on the subject;* I have forgotten what it was. *Mr. Coudert did not ask for the paper* and I retained it in my possession.

"Q. Mr. Coudert did not at that time know there was any such paper? A. I do not know.

"Q. Did you tell him so? A. I do not know why I should tell him so.

"Q. Did you purposely conceal it from him? A. I concealed nothing. I produced *everything tha was asked for.*

"Q. Did you produce that paper at that probate court or produce it to Mr. Coudert or Mr. Rollins at any time before the agreement for this release was signed? A. I had all the memoranda on this probate contest, and as they were called for produced them. *That was not called for and it was retained.*

"Q. Please to state how Mr. Coudert could know that such a paper was in existence or Mr. Rollins? A. He could have asked if there were other memoranda. I take that back, I decline to answer.

"Q. Did you tell him there were any other memoranda? A. I have already answered as fully as I can.

"Q. Did you try to conceal that other memoranda from him? A. I tried to conceal nothing.

"Q. Did you conceal it from him? A. I did not.

"Q. Did you show it to him? *A. I did not volunteer to show it to him.*

"Q. Did you let him know it existed? A. I had no conversation that I recall on the subject?

"Did you, in writing Mr. Coudert, let him or Mr. Rollins know of its existence? A. I have no recollection of having had any correspondence with him on the subject of that memorandum or any memorandum except as I have already stated.

"Q. Did you let them know of the conversation that Mr. Vaughan testified to as taking place between him and Mr. Fayerweather on the morning of the dying day, in substance that other institutions

as to the residue would have to be found, and the money would have to be given to them? Will you swear you ever let Mr. Condert or Mr. Rollins, let them know anything about that and that they ever knew anything about that until two years after you got those releases? A. I do not recall, but this I do know, I was employed to obtain the probate of these papers offered for probate as the will and codicils of Mr. Fayerweather. Mr. Coudert was the opposing lawyer. I recognized the right of Mr. Coudert to any information in the possession of these gentlemen for which Mr. Coudert asked (but have yet to learn that if Mr. Coudert thought that evidence of which I knew would be favorable to his side of the controversy, I being on the other side, my duty to my clients required that I should endeavor to hurt their case. I understand that my professional duty was just the reverse of that). Remember, this was the question of the probate contest.

"Q. Was that memorandum on an envelope, the memorandum you have referred to? A. I do not understand the question.

"Q. Was the memorandum that you have referred to in one sentence of which was 'other institutions for benefit?' A. I do not understand the question. I testified time and again yesterday and to-day that there was such a memorandum, and have testified to all I know about it.

"Q. The memorandum in question is one that contained among other sentences the one "other institutions for benefit." A have said so a great many times.

"Q. You have said so. Did you produce that at the probate trial? A. The probate had nothing to do with any such inquiry, but *I did have that*

paper on the chance that it might be asked for and was ready to produce it.

"You had it there on a chance that it might be asked for and you were ready to produce it.

Did you give any information to the widow and nieces or to their counsel or either of them that there was such a paper in existence? A. I think it is extremely unlikely that I should do so.

"Q. Did you? A. I have no recollection further than I have testified."

A. I cannot remember whether I gave that exact testimony.

73 Q. Did you testify substantially as embodied in the last question on that occasion?

A. It is impossible for any witness to give a truthful answer to a question of that kind, it incorporates long passages which it is impossible to keep in the memory, and then asks a summing up question in reference to them. My memory is not of that kind that it enables me to give an answer one way or another upon such a question. I can tell what occurred.

74 Q. Do the statements embodied in that question, so far as they relate to you and your action correctly state the facts of the matter?

A. I cannot keep in mind the whole of the question.

164 Q. Did you not testify in the Dayton reference:

"A. I do not remember where the memoranda were or in whose possession, I know that one that I regarded as of the greatest importance was in my possession"? In connection with the question I state to the witness that if he desires it I will produce to him the record of his testimony in the Dayton record to refresh his memory.

A. I can only say what I have heretofore said, that whether I gave that *exact* testimony I cannot recall. I do not know that I was a witness upon the Dayton reference about other matters, and that occasion was taken to ask me general questions, and reference was made to the envelope which has been spoken of as having been marked upon the Truax trial OA, and I can remember that I thought at the time, and I presume I testified, that *there was one aspect of the situation in respect of which I regarded that as of importance*, not, however, as having any bearing upon the probate contest. Its importance was in enabling Mr. Vaughan to refresh his recollection with reference to a conversation which he testified to have taken place between Mr. Fayerweather and himself on November 15th, 1890, which conversation he testified to upon the probate trial and also upon the trial before Judge Truax, if my memory serves me correctly.

165 Q. Was that a memorandum made by Mr. Vaughan in substantially the last interview that he had with Mr. Fayerweather in which Mr. Fayerweather, according to your understanding, told him that so far as Mr. Fayerweather had any wishes on the subject this residuary estate was to go to other institutions.

A. My only knowledge upon the subject consists of what Mr. Vaughan testified to. My recollection is that Mr. Vaughan, on the two occasions to which I have referred, testified to a conversation with Mr. Fayerweather on November 15th, 1890, in which reference was made to other institutions or other institutions for benefit, or put your heads together and find other institutions, or some expression of that kind, and that Mr. Vaughan testified that he put down the words, " Other institu-

tions for benefit", or something of that kind, upon the back of an envelope which I assume to be the envelope referred to.

166 Q. Is it not true that Mr. Vaughan testified in the probate proceeding that *after the execution of the codicil* of November 15th, 1890, he had an interview with Mr. Fayerweather in which Mr. Fayerweather said in substance that they must put their heads together and find other institutions for benefit, and was not that all that Mr. Vaughan testified to on that subject in the Surrogate's contest.

A. Whether that was all that was testified to by Mr. Vaughan upon that subject I cannot, of course, recall. That he did testify to that effect I do remember. Whether he testified that the conversation was before or after the execution of the codicil of November 15th, 1890, I do not *distinctly* remember. All upon that subject which at the present time I can recall is the different positions taken upon the Truax trial about that conversation, on the one side by the counsel for the colleges, on the other side by the counsel for Mr. Reynolds. That leaves an impression upon my mind with reference to the period when Mr. Vaughan testified that he had this conversation.

167 Q. Is it not true that upon giving his testimony upon the trial before Judge Truax in the Five College action Mr. Vaughan changed the version given by him concerning the conversation concerning more institutions for benefit as it had been given in the Surrogates's contest by placing it on the morning of November 15th and prior to the execution of the codicil and by then representing that it was incident to instructions which he had in the morning received from Mr. Fayerweather concerning the codicil to be executed, and that he took

down the headings and substance of those instru - tions upon this envelope; and is it not true that that version of the interview concerning more institutions for benefit was first given by Mr. Vaughan in the court upon the trial of the Five College action and not upon the Surrogate's contest?

A. Words or language I cannot remember. My recollection is that so far as substance went what Mr. Vaughan testified to upon each action is the same. About the period of time, I have many times said that I have no present memory.

170 Q. Did you attend upon the trial of the case before the Surrogate with that memorandum OA in your possession ready to produce it if it were called for by Mr. Coudert?

A. My recollection would be that either I or somebody had the letter which is assumed to have been contained in the envelope, and I take it for granted that the envelope was with it. Upon this subject it is impossible for me, after an interval of over nine years, to testify with confidence, but my memory would be that I did have the letter and the envelope. In fact I have a recollection that some question arose about date and that the envelope was referred to to fix the date.

171 Q. Was referred to—do you mean by that that it was produced and exhibited by you?

A. No, I do not mean that. That depends upon the signification which attaches to the word "exhibited." My recollection is that it was there and that reference was made to it on this subject of a date, but just exactly in what connection or how I do not recall.

172 Q. Do you mean to say that reference was made to it by any one who was conscious at the time that it was actually in court excepting yourself?

A. I cannot speak about the consciousness of other people.

173 Q. Can you state any fact which seems to you to indicate, or from which you derive an impression in your memory, that those who spoke of it were aware that this envelope was then in court, excepting yourself?

A. All I can remember is that some reference was made to a date and that the envelope was referred to as fixing a date, but by whom or what occurred further in reference to it, I do not recall, I presume that the record will show.

174 Q. Was not the only reference to the envelope as fixing the date a statement in substance that if the envelope were produced it would fix the date, and that the suggestion was made that it should be produced, whereupon Mr. Arnoux and yourself at once made the concession about the date in dispute and did not produce the envelope?

A. So far as I recall, the production or non-production of the envelope had nothing to do with the concession about the date. What occurred and what was said by me and what was said by Mr. Arnoux I presume that the record will show.

Mr. Sherman.—The question is repeated.

The Witness.—I can make no other answer.

175 Q. The fact is, Mr. Parsons, that on that occasion when this date was spoken of and this envelope was referred to as something that would fix the date, you had that envelope in you pocket in court, did you not?

A. Not that I remember.

176 Q. Well, what did you mean ,then, by testifying before Mr. Dayton that you attended with

that memorandum yourself, regarding it as of importance, in Court on the probate trial ready to produce it if it were called for by Mr. Coudert ?

A. If that is a correct statement of what the stenographer's minutes show to have occurred, I meant exactly what I said. Mr. Coudert on the probate contest raised the question of whether there was or was not a secret trust ; the position of the counsel for the executors was that that was not an issue on the probate proceedings that the only issue there was will or no will, but as the Surrogate might hold that the question of Mr. Fayerweather's wishes was before him, and inasmuch as the conversation of the 15th of November, 1890, between Mr. Vaughan and Mr. Fayerweather might bear upon that subject, I was there among other things to have Mr. Vaughan state what occurred if necessary, and if question were made about it, or if it were necessary to corroborate his testimony, to refer to the memorandum "other institutions for benefit" which was unintelligible without his testimony.

177 Q. When you said in your testimony before Mr. Dayton, "I attended with that memorandum myself", did you mean that you had in your own physical possession in the Surrogates' Court the envelope Exhibit OA ?

A. If I made that statement, that is what I must have intended. Your previous question asked whether it was in my pocket.

178 Q. Did that memorandum on the back of Exhibit OA in lead pencil read as follows, according to your recollections: "Clause about Miss Joyce, about the men being with him, more institutions for benefit, Mrs. Beardsley's amount $100,000 in bonds, strike out about servants in his employ" ?

A. Something of that kind.

179 Q. The inquiry in reference to the envelope in the Surrogates' contest arose, did it not, substantially in this way: Mr. Vaughan had testified in substance that Mr. Fayerweather had not been shown a letter written by Mr. Ritch to Miss Joyce, Miss Amelia Joyce, in which letter Mr. Ritch makes some statement about his intentions and motives in drawing the will as it was drawn, and in that connection the question arose as to when the letter could have been shown to Mr. Fayerweather, or at any rate when it had been actually written; and Mr. Vaughan being on the stand, was asked this question:

"*By Mr. Root:*

"Q. Mr. Ritch states in this letter of the 13th that he has had two long talks with you. Is that true?"

To which Mr. Vaughan answered:

"A. I think that date is a mistake.

"Q. What do you think was the date? A. I think the letter must have been written on the 14th.

"*Mr. Coudert.*—Where is the envelope of this?

"*Mr. Arnoux.*—Mr. Ritch says that is correct, it was the 14th.

Mr. Parsons.—It was the Friday."

Is not that the way and the only way in which Mr. Coudert called for the envelope upon the trial of the contest in the Surrogates' Court?

A. I have no present recollection. I have testified to the extent of my recollection about what

took place with reference to that date. It is impossible for me after an interval of nine or ten years to recall details of this character; the substance in some cases I can remember, the exact words I cannot.

180 Q. When you testified before Mr. Dayton that you attended with that memorandum yourself, did that testimony apply to the occasion when Mr. Coudert said:

> "Where is the envelope of this"? and you answered, "It was the Friday"?

A. I do not know whether that occurred or not, and therefore I cannot tell whether my testimony referred to any such occurrence or not. I have stated all that I remember about the question of date.

181 Q. And you have stated, have you not, on your present examination, as a matter which you remembered, that Mr. Coudert made some reference to this envelope?

A. I do not remember to have said that; I stated that on the part of somebody some question arose about date.

184 Q. Can you recall any fact which explains why, when Mr. Coudert said in the Surrogate's contest, "Where is the envelope of this?" and you then attended with that memorandum yourself, you did not then produce it?

A. I cannot remember that what is assumed in the question occurred, and of course I cannot make an answer upon a hypothesis of that kind. What I remember is that some question arose about the date of something and that either a reference was made to the post mark on the envelope of a letter or that in some way counsel agreed upon the date

but just how that result was reached I fail to remember. I can remember matters which occurred upon that trial which in my judgment or according to my recollection bore upon the probate contest; there were many other matters introduced upon that trial which I did not think related to the probate contest, and they made a less impression on my mind.

185 Q. And in that last statement do you include Exhibit OA?

A. I include the conversation to which Mr. Vaughan testified. *Exhibit OA was of no value by itself;* my recollection of it is that it was a blurred envelope as to which Mr. Vaughan testified that upon it he made some pencil memorandum when with Mr. Fayerweather on November 15th, 1890. The substantial things, the material things, was what then occurred. To that Mr. Vaughan had then testified or did then testify.

186 Q. Do you mean by your last answer to convey the idea that you do not remember whether the blurred envelope did not contain thereon those words which had been previously read to you that day?

A. I mean to say that nothing was clearly written on the envelope. I have said that the envelope was blurred, as would be the case with a pencil writing which a man had carried in his pocket; but it did say and I know that it contained the words which appear on the Truax trial, because I there again had with me that envelope and the letter which it contained; the envelope I remember particularly, and my recollection is that I sought to get that envelope in evidence then, and that either the envelope or the conversation between Mr. Vaughan and Mr. Fayerweather to which it re-

farewell was objected to by the counsel for Mr. Reynolds, and that after persistent objections on their part I tried to get that conversation in evidence by using the memorandum on the envelope, and that against objection by counsel for Mr. Reynolds and others I got so far as to procure permission from the Court to have Mr. Vaughan state that from what was said by Mr. Feyerweather to himself on that morning he did take down the pencil memorandum; and in my effort to get the conversation before the Court against the objection of counsel for Mr. Reynolds and others I finally offered the memorandum. This also was objected to, but in the end my recollection is that both the conversation and the memorandum came into evidence. I saw the memorandum at that time.

247 Q. You were in the Trance trial relating the effort of the plaintiffs there to establish the contention that Mr. Feyerweather in his lifetime had made an agreement with his executors that in substance if they should leave them the residuary estate he would dispose of it by applying it to the institutions enumerated in the sixth clause of his will, and thereby avoid any question of the operation of the Statute of Wills of 1830 upon the will as a testamentary paper, were you not?

A. That is a partial and incomplete statement of what I was there for, possibly that being within the general function which I thought belonged to me then.

248 Q. And in pursuance of that existence to that contention you introduced, among other things, the conversation and this envelope, did you not?

A. I introduced that conversation in order that the Court might be informed about any expression of Mr. Feyerweather with reference to my wishes

he might entertain ; I did not introduce the envelope for any such purpose ; I used the envelope to try and get in evidence the conversation over the resistance and objections of Mr. Reynolds' counsel and the counsel for the colleges. As the Court sustained the objection to the conversation, and I thought the Court ought to be informed about it, I tried to get the conversation in by first getting the envelope in and then showing that the envelope was a memorandum of a conversation. The envelope had no importance of itself ; the conversation was the important thing, and when I say Mr. Reynolds' counsel I do not mean Mr. Sherman. The first counsel known to me to represent Mr. Reynolds was Mr. Coudert. The counsel upon the Truax trial was Colonel James. Mr. Sherman was not, so far as I know, related to the litigation at that time.

189 Q. At the time you so introduced the Exhibit OA in the trial before Judge Truax, evidence had been given having a tendency to show that the absolute devise to the executors of the residuary estate was subject, if not to any controlling trust or restraint, to some expression of wishes upon Mr. Fayerweather's part as to the disposition of it or of some of it by the executors, is it not so ?

A. I will not say that there was at that time any evidence in the case which in my judgment tended to show that there was any limitation upon the devise of the residuary estate to the executors. There were in evidence the memoranda to which reference has been made upon which that claim was predicated, and it was contended that promises were to be inferred or were made by Mr. Ritch, Mr. Vaughan or Mr. Bulkley, either, any or all.

When I say it was contended I mean that it was contended by the counsel for Mr. Reynolds, and in an indirect way, or perhaps a direct way, the same contention was made by the counsel for the colleges.

I was my opinion then, and I have never changed it, that no promise by Mr. Ritch was proved, that no promise by Mr. Vaughan was proved, that no promise by Mr. Bulkley was proved, and that there was no evidence to justify that claim. Mr. Bulkley had never spoken to Mr. Fayerweather upon the subject. Between Mr. Fayerweather and Mr. Ritch there had taken place what was in evidence as shown by the testimony of Mr. Ritch, that is to say, I assume that from Mr. Ritch's testimony. And between him and Mr. Vaughan had occurred that to which Mr. Vaughan has testified so far as his testimony disclosed. The Court held that putting it altogether it showed a trust. I bow with due submission to the judgment of the Court, but that is without any reference to whether I think the judgment is right or wrong.

191 Q. What bearing did you suppose the testimony of Mr. Vaughan concerning "more institutions for benefit" would have or should have upon the establishment or destruction of a secret trust for which the plaintiffs were in that action contending?

A. The bearing of the conversation between Mr. Fayerweather and Mr. Vaughan, at which time was made the memorandum as Mr. Vaughan testified, bore upon the claim made by the plaintiffs in that suit, and if my recollection serves me correctly made by Mr. Reynolds, through his counsel, that there was a trust in favor of colleges, that Mr. Fayerweather's wish was that his residuary estate

should go to colleges. It seemed to me that Mr. Vaughan's testimony of that conversation showed that that was not so. It bore neither one way nor the other upon the question of trust or no trust;

29. Q. Was Henry B. Vaughn examined as a witness on the contest?

A. He was.

30 Q. Do yon recall an envelope upon the back of which, according to his testimony in the Five College action, Mr. Vaughn took down from Mr. Fayerweather's lips on the morning of November 15th, 1890, instructions for a codicil to be executed, and which envelope was marked in evidence in the Five College action, Exhibit OA.

A. I remember that upon the trial of the five colleges' suit Mr. Vaughn was examined as to what occurred between Mr. Fayerweather and himself on November 15th, 1890, and that to refresh Mr. Vaughn's recollection or in corroboration of his testimony I put in evidence some memoranda which has been made by him on an envelope on that day. I do not remember Mr. Vaughn's testifying that the memoranda were taken down by Mr. Fayerweather's lips.

31 Q. Do you know where that envelope is now?

A. I do not.

32 Q. When did you last see it?

A. I certainly saw it on the trial of the five colleges' suit, because I put it in evidence myself. I have no present recollection to having seen it since.

33 Q. Have you any knowledge where it is now?

A. None. I presume it is somewhere among the Fayerweather papers, but there are bushels of them. Whether the fact is so or not I do not know. What I do know is this, that hav-

ing been subpœnaed as a witness a month or so ago by Mr. Sherman, or I assume by Mr. Sherman, to produce that envelope, I directed a search to be made in my office for it and the answer was that it could not be found. There is a copy of it in the records of the five colleges' suit.

34 Q. Did Mr. Vaughn testify in relation to that envelope marked OA in the Five Colleges' action in the course of his testimony before the Surrogate on the will contest?

A. Mr. Vaughan, on the trial before the Surrogate, testified to what passed between Mr. Fayerweather and himself on November 15th, 1890, *to the same effect as did he testify* upon the trial of the five colleges' suit. His testimony upon the Surrogates' trial, if my memory serves me correctly, was in answer to Mr. Coudert, counsel for the proponents taking the position that the Surrogates' contest was to be limited to matters which bore upon the issue of will or no will, and that matters relevant to other proceedings were immaterial and irrelevant there, none the less Mr. Vaughan did give—or testified to what occurred about other institutions, and if my recollection is correct, *precisely the same* as did he testify before Judge Truax. The importance of the memoranda was that if any question were made of the testimony of Mr. Vaughan, the memoranda furnished a certain amount of corroboration, and furthermore, they refreshed Mr. Vaughan's recollection. Aside from that the memoranda were incompetent and were immaterial.

The Witness: The memorandum which I understand to have been the subject of testimony here appearing on the back of Exhibit O A is "more institutions for benefit." Mr. Vaughan did testify

about what occurred between Mr. Fayerweather and himself upon that subject. If the question asks whether, before the Surrogate, direct reference was made by Mr. Vaughan to the back of the envelope, I do not recollect that any such reference was made. He testified to the conversation.

35 Q. Mr. Parsons, was any other reference made to this envelope in the contest in the Surrogate's Court except this, that there came up in the Surrogate's Court a question as to when a certain letter had been mailed by Mr. Thomas G. Ritch, mailed or written by Mr. Thomas G. Ritch, that there was a controversy between witnesses as to whether it had been written on the 13th or the 14th of November, 1890, that it was mentioned by Mr. Vaughan that the post mark on an envelope for that letter would show, that there was a call by Mr. Coudert for the production of that envelope, that Mr. Coudert thereupon said, "Where is the envelope?" whereupon Judge Arnoux interposed with the statement that the contention was right, that it was the 14th of November? Is there any other reference to that envelope in the Surrogates' record than that, or that in substance?

A. It is impossible for me to remember such details.

36 Q. Does it refresh your memory to call your attention to the fact that upon Mr. Arnoux's interposition you followed it up by saying it was the Friday?

A. It does not; I have no memory of the details of what then occurred.

37 Q. Was there any statement in the Surrogates' test by any witness that the envelope thus referred to contained upon it any writing embodying instructions given by Mr. Fayerweather on

November 15th, 1890, for the preparation of a codicil to his will?

A. The proceedings before the Surrogate were taken down by a stenographer. I presume that his minutes will show what occurred. If the question asks my present memory upon the subject, I can only repeat the answer which I have heretofore given that it is impossible for me after nine years to remember details of that kind.

38 Q. Mr. Parsons, did you hear Jabez Holmes, Jr., testify in the case of Amherst College *vs.* Ritch before Judge Truax?

A. I presume so if he were examined as a witness. I was present at that trial.

39 Q. I will read from the Five College record which the defendants have introduced what purports to be his testimony in that trial, and thereafter ask you a question about it. Pages 748 and 749:

"Jabez Holmes, Jr., called by Mr. Root, being sworn, testified as follows:

"Q. Have you examined the testimony of Mr. Vaughan before the Surrogate upon the contest of Mr. Fayerweather's will as is contained in this volume to which counsel has been referring you, and from which I have just been reading? A. I have.

"Q. Did you examine it to ascertain whether there was any reference in that testimony to the envelope which has been marked 'Exhibit OA,' and which is said to have contained the letter of Mr. Ritch to Miss Joyce?"

Then follows some objections.

"A. I did.

"Was there a reference made to that envelope?

"A. There was.

"*Mr. Root.*—I read the reference from page 687. The letter appears at page 686, and that is followed by this: 'That is signed by Mr. Ritch.'

"*Mr. Parsons.*—I think you had better give Mr. Ritch's signature.

"*Mr. Coudert.*—It is signed, Thomas G. Ritch.

"It is conceded all to be in Mr. Ritch's handwriting?

"*Mr. Parsons.*—Yes.

"Q. Mr. Ritch states in this letter of the 13th that he has had two long talks with you. Is that true? A. I think that date is a mistake.

"Q. What do you think was the date? A. I think the letter must have been written on the 14th.

"*Mr. Coudert.*—Where is the envelope of this?

"*Mr. Arnoux.*—Mr. Ritch says that is correct, it was the 14th.

"*Mr. Parsons.*—It was the Friday.

"Q. Is that the only reference made in the course of Mr. Vaughan's testimony to the envelope of the Joyce letter? A. That is the only one I saw."

Mr. Parsons, is your memory refreshed by that which I have read you as to whether in the Surrogate's contest any testimony was given respecting the envelope marked Exhibit OA in the Five College record?

A. My memory is not refreshed by the testimony which is attributed to Mr. Jabez Holmes. If Mr.

Holmes' statement about what he testified to is correct, he said that he only saw a certain reference to the envelope. Whether he did or did not or whether there is or is not any such reference I could only tell by an examination of the record of the proceedings before the Surrogate. I do remember, as a matter of memory, that as to some letter which came in evidence before the Surrogate, a question arose as to which reference was made to an envelope to fix the date, and it may be that it was this envelope about which inquiry is made; whether that is so or not I cannot as a matter of memory recall.

40 Q. Does your memory serve you that the envelope in question was the cover to a letter written by Thomas G. Ritch to Miss Joyce and that the letter it enclosed was put in evidence in the Surrogate's contest?

The Witness.—I remember that the envelope was assumed to have been the envelope in which was contained some letter which must have been written prior to November 15, 1890, because it was in Mr. Vaughan's possession on that date and *his memorandum about other institutions for benefit was written on the envelope which contained this letter*, and it may easily be that the letter was from Mr. Ritch to Miss Joyce; I cannot state that as a matter of memory.

42 Q. Do you remember that the envelope in question was in your personal possession at the time the letter in question was produced and put in evidence in the Surrogates' Court, and that you produced the letter without the envelope?

A. I can only repeat what I have frequently said that it is impossible for me as a matter of memory to recall the details of this character. I remember in a general way that there were produced, and I

think very likely by me, certain memoranda and certain letters, and if the letter which is assumed to have been within this envelope was called for, and I think that it was, then both the letter and the envelope were in the Surrogates' Court.

43 Q. Mr. Parsons, have you now in your mind any positive impression that the envelope marked O-A in the Five College Trial was ever exhibited to any one or seen by any one after the 15th of November, 1890, until after the execution of the releases—I mean by any one either counsel for or representing Lucy Fayerweather, Emma S. Fayerweather or Mary W. Achter?

A. I have no present positive recollection on the subject one way or the other. What I know is that upon the trial before Surrogate Ransom the conversation to which the memorandum "More institutions for benefit" referred, was testified to by Mr. Vaughan, and I think in answer to Mr. Coudert, and I think that the record will show that such was the fact [and that Mr. Coudert knew about that conversation at that time].

Mr. Sherman.—I move to strike out so much of the answer as begins, "and that Mr. Coudert", and from there on, as not responsive.

Mr. Bovee.—We object to the striking out.

44 Q. Is it not true, according to your best recollection, Mr. Parsons, that the only allusion made by Mr. Vaughan upon his testimony in the Surrogate's Court to a conversation with Mr. Fayerweather about more institutions for benefit is contained in a statement which Mr. Vaughan there

made described to be a conversation with Mr. Fayerweather *on the afternoon of November 15*, 1890, and after the execution of the codicil bearing date that day?

A. I have no memory as to what was the testimony about the period of the day when that conversation took place. I have a distinct memory that Mr. Vaughan testified before the Surrogate, and I think in answer to Mr. Coudert, about that conversation, *something about putting their heads together*.

45 Q. And do you not remember that that was stated by Mr. Vaughan to have occurred *on the afternoon* of November 15th, 1890, and after the execution of the codicil?

A. I remember that upon the trial before Judge Truax there was taken against the executors the objection that that conversation related to a *future* codicil or will, and I have a sort of recollection that that was put upon the time or the hour on the 15th of November, 1890, when there occurred between Mr. Fayerweatoer and Mr. Vaughan the conversation referred to; but without reference I cannot recall Mr. Vaughan's testimony as to what occurred at one time or other of the times when he saw Mr. Fayerweather on that day. I remember distinctly the position that was taken about it at some stage of the litigation adverse to the executors.

It is plainly of the utmost importance to know whether Mr. Parsons' excuse for withholding Exhibit Oa at the Surrogate's contest is valid, and that will depend chiefly upon the fact whether Vaughan's testimony as to the conversation with Mr. Fayarweather was the same at the contest as it was in the Five College action; if Oa was the rec-

ord of instructions for the dying day codicil, then obviously it was of the utmost importance upon the question of the validity of the paper propounded as such. If Vaughan placed the conversation after the execution of that codicil, at the contest, then Oa was no more important than Mr. Parsons professes to consider it. But if he placed it after the execution of the codicil, when, in fact, is was before, and when it embodied the instructions for that codicil, he grossly deceived the parties, imposed upon the Surrogate, withheld a writing, the importance of which cannot be overstated, and subjected the probate decree to the revision here sought.

The fact is that Vaughan in his testimony at the Surrogate's contest, swore that the conversation with the testator was after the codicil was executed and the witnesses had gone away (Vol. IV, pp. 553, 554; V, Five College record, pp. 748, 749).

In the Five College action, Vaughan swore (Vol. IV, pp. 581, 582, in this Record ; p. 456, in that Record) as follows :

Page 456.

Q. Look at the envelope which is marked "Exhibit Oa", and state whether that contains other memoranda made by you at that time ?

A. Yes, sir.

Mr. Parsons : We offer them.

By the Court :

Q. When were those memoranda made ?

A. The morning of the 15th.

By Mr. Parsons :

Q. While you were with Mr. Fayerweather?

xxx A. Yes, sir.

Q. From what, if from anything or from anyone' did you take down what is written by you in pencil on the back of Exhibit Oa, that being the envelope which contained Mr. Ritch's letter to Miss Joyce ?

XXX Q. Did you take it down from what anyone said ?

A. From what was said between Mr. Fayerweather and me that morning.

XXX Q. Do those pencil memoranda made by you on the back of that envelope, Exhibit Oa, correctly show things said by Mr. Fayetweather to you in that interview?

XXX A. Yes, sir.

Q. In this interview did you receive from Mr. Fayerweather instructions with reference to the last codicil, with reference to the preparation of the codicil of the 15th of November, and did you go down to Messrs. Arnoux, Ritch & Woodford's office with those instructions, after that interview ?

A. Yes.

Q. During the interview was anything said between Mr. Fayerweather and yourself with respect to what was to be done with the residue of the estate, assuming that such a codicil as the last codicil was executed by him ?

A. Mr. Fayerweather referred to his competeney in selecting institutions for benefit.

Q. State what he said.

A. Stated that he was not very well fitted for such purpose, but that he had used his best endeavors and obtained the best advice that he could get, and then went on and said that there would have

to be others found to whom the rest of the money should be given.

XXX A. He said that he had selected, by the best advice that he could get, such institutions as he thought would be proper to be benefited.

XXX The Witness.—He stated after, further selections would have to be made.

Q. Do not say referred.

A. Mr. Fayerweather told me then what he had done with reference to selecting those institutions, and stated that other institutions would have to be selected, and did not refer to any particular institutions that should be by name, but indicated—

By Mr. Parsons:

Q. How did he indicate?

A. Said that the surplus of the money would have to be given to other institutions.

By Mr. James:

Q. What kind of institutions?

A. There was no special kind of institutions referred to; it was left—

By the Court:

Q. Have you stated all, now?

A. That is all I recollect on that subject.

Page 625–626.

XXX Q. Mr. Vaughan, now state, what, if anything, was said between Mr. Fayerweather and yourself upon the subject inquired about, subsequent to the execution of the codicil.

Same objection.

A. We were to put our heads together and find other places for the money.

By the Court:

Q. That is what he said?

A. Yes, sir; that is what he said, as near as I can remember the words.

By Mr. Parsons:

Q. Were you in the house while the exhibit was being executed?

A. Yes, sir.

Q. And did you return to his room immediately after the execution?

A. Yes, sir; not perhaps immediately; I think I accompanied Mr. Grout and Mr. Browning downstairs.

Q. And then you returned to Mr. Fitzsimmons's room?

A. Then I returned to Mr. Fitzsimmons's room.

Q. Then there took place the conversation that you have referred to?

A. Yes, sir.

XXX. *Mr. Parsons:* I offer again to show that, upon the prelude context, Mr. Vaughan testified to what occurred in an interview with Mr. Fitzsimmons *subsequent to the execution of the last exhibit*, as testified to by him now.

Mr. Jones: We make the same objection.

Objection sustained; exception.

Q. When you were examined in the prelude context was there put to you by Mr. Parsons these questions and to them did you make these answers (I read from page 708, folio 49152)?

Q. After the execution of the codicil, and after Messrs. Grout and Browning had gone, did Mr. Fayerweather say anything to you upon the subject of the codicil?

A. The only remark I can recall was to put our heads together and find places to put the money.

Q. When did he say that to you?

A. *That was after the first time;* he said to me as I was speaking here after the signing of the codicil.

XXX Q. Did you so testify?

A. Yes, sir.

Q. Is your recollection distinct that you gave this testimony?

A. Yes, I made that answer, and that was the fact.

XXX Q. Was the letter, Exhibit O, produced by you before the Surrogate, and then and there put in evidence on the contest over the will?

A. I gave that letter to Mr. Parsons, and if I recollect correctly it was put *in at the demand of Mr. Coudert.*

Page 490.

Q. You had a conversation with Mr. Fayerweather that morning, did you not, in regard to the making of a further codicil to his will?

A. Yes, sir.

Q. You say you told Mr. Fayerweather that Mr. Mr. Ritch was all right?

A. Yes, sir.

Q. Did you tell Mr. Fayerweather that you had got from Mr. Ritch an answer to his letter?

A. No, sir.

Q. Did you tell him that you had got from Mr. Ritch copies of the private memoranda which Mr. Fayerweather had left with him?

A. I don't remember that I did.

Q. Do you remember whether you did or not?

A. My best recollection is that I did not.

Q. Isn't it a fact that you read over these memorandas to Mr. Fayerweather?

A. I don't recollect that I did.

Page 491.

Q. Do you remember whether you did or not?

A. My best recollection is that I did not.

Q. Didn't you read over one of them to Mr. Fayerweather?

A. My best recollection is that I did not read one of them.

Page 495.

Q. Did you testify before the Surrogate about any conversation between Mr. Fayerweather and yourself on the morning of November 15th, or during the forenoon of November 15th, or at any time on that day *before the execution of the fourth codicil* in regard to any institutions whatever?

A. I don't remember if I did or not.

Q. You were examined by your own counsel, Mr. Parsons, before the Surrogate, were you not?

A. Yes, sir.

Q. Did you produce before the Surrogate this envelope having upon the back of it the pencil memoranda, and marked "Exhibit Oa"?

A. I don't remember if I did or not.

Q. Have you a recollection whether this envelope was produced there?

A. I don't remember.

Q. Have you no recollection as to whether you testified before the Surrogate to any conversation

whatever with Mr. Fayerweather on the 15th of November, prior to the execution of the codicil in regard to any institutions?

A. I have no recollection.

Q. None whatever?

A. No.

Q. Has this envelope, "Exhibit Oa" been in your possession ever since the 15th of November, 1890?

A. That envelope was in the safe deposit vault of the Nassau Bank, and was taken out from the bank upon the receipt of one of the subpœnas as a witness in the case.

Page 496.

Q. Was that the first time that it had been out?

A, Oh, no; that is the last time it was taken out.

Q. You had it in your possession at the time of the hearing before the Surrogate, hadn't you?

A. I am not sure of that, whether I had or not.

Q. Who did have it if you did not?

A. I may have had it, but I am not sure.

Q. Had you given it to anybody else at any time since the 15th of November, 1890?

A. I gave the letter that was in it to Mr. Parsons, but whether I showed him the envelope at the time I do not know.

Q. It was not produced and exhibited to anybody before the Surrogate?

A. I don't remember whether it was or not.

Q. You have no recollection about it?

A. No, sir.

Q. You have no recollection that it was produced?

A. No, sir.

Q. And you have no recollection that you ever testified before the Surrogate upon the subject of any conversation with Mr. Fayerweather on the 15th of November before the execution of the fourth codicil in regard to institutions?

A. I have no recollection; but I don't mean to say that I did so testify.

Q. Had you any reason for not testifying before the Surrogate in regard to any conversation between Mr. Fayerweather and yourself about institutions on the forenoon of November 15, 1890?

We now invite attention to the divergence between the instructions for the codicil, the instructions communicated by Vaughan to Ritch and the codicil as propounded and admitted to probate.

Ritch testified in the Surrogate's contest (Vol. V, p. 806):

"He (Vaughan) said that he had come to have a codicil drawn at Mr. Fayweather's request, adding himself as a residuary legatee, that it was Mr. Fayerweather's wish. I said that I would attend to the matter, but that I had an engagement with gentlemen out of town, and that I would take him into Mr. Woodford's room. He went in there with me. Q. One moment. Is that all of the conversation that you had with him in your room? A. That is all of the conversation that I recollect; it was very brief. Q. Did you ask how Mr. Fayerweather was? A. I did. Q. What reply did you get? A. He said that Mr. Fayerweather was very ill that day. Q. Did he say that he did not think he would live the day out? A. He said that the doctor had told him that whatever papers were to be executed had better be executed during the day. Q. This conversation you had before you went into General Woodford's room, is that all? A. That was all.

Q. Did you ask him if he had brought any evidences of his authority to speak for Mr. Fayerweather? A. From the evidences that I had had during the week——. Q. No, I asked you if you asked him? A. No, I did not, I assumed—— Q. You assumed that he had authority? A. He said he came from Mr. Fayerweather. Q. Now you may tell me why? A. He said that he came from Mr. Fayerweather. Q And was that enough for you? A. I believed that he would tell the truth"

The imputed *laches* based upon the failure of complainants sooner to assail the probate is without justification.

The "admission" in the Five College Action that the will of 1884 was the last will, was an admission of what, in law, then was and now is true, in the absence of an annulment of probate by a competent jurisdiction. It is an admission of a fact essential to jurisdiction of that action and there conclusively presumed to be true.

Being made, too, in ignorance of essential facts disclosed since and set up and proved in this suit, there was no estoppel from those admissions, and the conclusiveness of that judgment does not rest upon any estoppel peculiar to these parties and additional to what common to all judgments. If the pleas were so intended they were double, and therefore bad, as shown under our point V.

There are various essential facts which ripen previous circumstances of the highest suspicion, suspected before judgment in the Five College Action, into absolute certainty of fraud in and about the procurement of the decrees of probate. In addition to those discussed by Mr. Blaikie in his brief, may be mentioned those following;

The obvious physical control of the signature of

Mr. Fayerweather to the dying day codicil, a most essential feature of the will (as probated). It is essential because by it, alone, was the *title* to the residuary estate vested in Vaughan, as a joint legatee and trustee. The circumstances are most convincing, moreover, that, by the burnt codicil, Ritch was eliminated as an executor, legatee and trustee.

The give and take, between Vaughan and Ritch, whereby Vaughan restored Ritch to favor and executorship, and Ritch "took Vaughan in on the ground floor" as a residuary legatee, are most obvious. The transaction benefited *them* exclusively. It added nothing to Mr. Fayerweather's known and expressed wishes. In fact it was, as we will show, in violent conflict therewith. When to these suspicious circumstances, the disclosure is made that the signature is not the act of the decedent, the case reaches the highest probative force.

Now, when was this condition of the signature disclose .

During the progress of this action and under the coercion of an application to the Court, unless Ritch should produce the codicil, that his answer be stricken out. (Ritch, Vol. II, p. 999, 1003, 1009, 1010, 1020. Marsac, Vol. II, p. 1045 to 1047. Cooper, Vol. II, p. 1037 to 1044). Ritch is identified by an unbroken sequence of testimony as having the possession of this codicil, except the brief period when it was flashed before the Court in the stress of trial before Judge Truax.

Ritch swears he does know what has become of it. Then we move to strike out this answer unless he shall produce it. While the Circuit Court has under advisement a motion to strike out Ritch's answer, his partner, Mr. Bovee, drifts into the Surrogate's

office, and after fussing around the files of wills, insists upon Marsac's making another search. Marsac persists that he has looked everywhere. Bovee tells him that the will may be out of its alphabetical order. Marsac says he has looked out of the alphabetical order. Bovee persists and Marsac finds it where Bovee tells him to look for it.

We never had the opportunity previously to inspect it, expose it to critical scrutiny by competent experts or to photograph it. That being done (Vol. II, pp. 271 to 286) the inspection of the photographs of the dying day codicil in the record (Vol. IV, pp. 450, 451, 452) and of its endorsement, confirms all our theories, contradicts the evidence in support of the probate and justifies our attack upon the probate decrees.

Again the dealing with exhibit "Oa" which throws a most powerful side light upon this probate and upon the validity of the dying day codicil, was wholly unknown to us at the probate and only partially disclosed at the trial of the Five College Action.

It will be remembered that "Oa" is an envelope of a letter which came into discussion at the probate. A dispute as to the date of the post mark upon the letter was hurriedly closed by an admission of the date favorable to the contention of the contestants. Inasmuch as the admission appears to be contrary to the fact, and the defendants still refuse to produce it, it could have been made only for the purpose of dispensing with the production of the envelope. Mr. Parsons testified in various proceedings of accountings, *after the judgment* in the Five College Action, to his connection with Exhibit O^a. He was examined in this case on the subject. His deposition is digested above.

It will be seen, allowing for the idiosyncracies of the witness and his captious and evasive method of testifying, that Exhibit Oa was in his possession during the probate contest, that he did not produce it because he thought it would hurt his client's case and that he represented to Messrs. Coudert and Rollins, who had made a motion to compel inspection of all related writings and in order to get rid of that motion, that he would and did voluntarily exhibit all such writings. The probate ended without any disclosure of this writing or of the circumstances which made it of the highest importance as bearing upon the dying day codicil;

These circumstances were as follows:

Vaughan had an interview with Mr. Fayerweather on the morning of the dying day. Mr. Fayerweather gave him instructions for another codicil to be drawn, including the direction "more "institutions for benefit." These instructions Vaughan wrote down upon the envelope exhibit "Oa." When he learned from Dr. Vedder, a few minutes later, that Mr. Fayerweather might die that day, Vaughan arranged with the doctor to be a witness to a "paper" to be executed and to bring an associate physician. The doctor demurred to Mr. Fayerweather being called upon to sign any paper, as "he was a dying man." This undoubtedly led Vaughn, after conference with Ritch, to dispense with the doctors, entertaining such opinions, as undesirable witnesses, and Vaughan, after hurrying to Ritch's office and having the dying day codicil there drawn, returned with two clerks of Ritch's, as witnesses.

The deposition of one of them, J. Prentiss Browning, in defendants' proofs, contradicts the other, Grout, in material features.

Defendants' Testimony, Vol. III, pp. 274 to 356.

Grout gives an account of conversations by the bedside of the dying man (Surrogate's Record, pp. 499 to 547, Vol. IV, pp. 521 to 533). Browning swears that he did not speak and only nodded.

The other attesting witness, Lizzie Joyce (Vol. IV, pp. 453 to 469), contradicts Grout, swearing not only that the dying man did not speak, but that Grout held his hand while his signature to the codicil was made.

The testimony of Lizzie Joyce and Carvalho (Vol. II, pp. 715 to 736), and the photographs (Vol. IV, pp. 451, 452) show that Grout controlled the signature of the dying day codicil, and that the "D. B." therein have the characteristics of the same letters in the endorsement, which Grout admittedly wrote (Vol. IV, p. 450; fol. 1030; Compare Exhibit 82, p. 451, and Exhibit 84, p. 452).

Now observe that, as was said in

Tyler *v.* Gardiner, 35 N. Y., 590:

"No essential provisions are directly traceable to the written instructions."

On the contrary, we now know what was unknown until Vaughan's testimony in the Five College action (Vol. IV, pp. 581, 582, 584, 589, 591; Five College Record, pp. 456, 460, 463 to 565, 483, 490, that this dying day codicil does not carry out a single feature of instructions, which were withheld at probate, written upon Exhibit Oa, but that Vaughan concocted and carried out the manufacture of a codicil which benefited *him only*, in direct conflict with the immediately recent instructions of the testator.

In the light of this most prodigious disclosure, was it not a fable told by Grout as to this dying man, rising unaided, swinging himself around on the side

his bed, able without glasses and without aid to see the place for his signature upon a writing, when for years he had not been able to read without powerful glasses, and at his last gasp indulging in idle banter as to the clearness of his signature, then lying down and dying eight hours after, of a chronic, enfeebling and progressive disease ?

In extremis, able, only to nod. Grout's story is a most audacious fiction. It becomes highly likely, as Albion M. Dyer, a witness not assailed, impeached or contradicted, except by a bare denial of Grout, testifies in this record (Complainants' Vol. II, pp. 1063 to 1072), that Grout told him : Mr. Fayerweather was, at that time, not in any condition to resist. He was so feeble that he was unable to sign his name without help, and that he (Grout), assisted him in doing so.

Exhibit O2 and its attended circumstances are new facts of the most vital importance to assail the probate of the dying day codicil, and they were not known, any more than the assisted making of this remarkable signature, of the signature was known, until recently.

The disclosure in the effort to justify the charge of $55,000 against the estate made by Arnoux, Ritch and Woodford, that Mr. Arnoux had coached the witnesses to the codicils and that Mr. Grout's success as a witness was due to Mr. Arnoux's coaching, is assuredly a fact which in connection with the proof of the dying day codicil is most important (Vol. II, pp. 497 to 500, 501, 502). That was, of course, when it was all over.

It is said that these circumstances are merely cumulative.

If they are, what does that show ?

The deposits of the coral insect are cumulative, the result is only important when they are accumulated. Then they become islands, the tops of submarine mountains.

The rule which is invoked to estop us because we did not attack the probate in the Five College action has its qualifications which are well stated in

Marshall *v.* Holmes, 141 U. S., pp. 600, 601.

Platt *v.* Platt, 58 N. Y., p. 646, where it is said:

"*Laches* cannot be said to exist where a party is ignorant of his rights or where, though apprehensive of them, there is such an obscurity in the transaction that he must, with painstaking, gather the facts or the evidence of them upon which the successful prosecution of the action must depend."

See also

Le Marchant *v.* Moore, 150 N. Y., p. 218.

Lewis *v.* Merritt, 113 N. Y., p. 390.

Nothing, then, was or could be adjudicated in the Five College Action to impeach the probate; and, if there could, complainants were not then in the position to do so, as upon these later disclosures.

II.

Assignments against the determination that the Five College judgment is due process of law to estop complainants from having a decision upon the merits upon every part of their claim.

The discussion of this point is so closely involved in the discussion of other points, especially the IIId and Vth, and is so illuminated by the brief of Judge Andrews, as to the legitimate effect of the judgment in the Five College case, that reliance is largely placed upon that discussion.

It will be observed that the assignments under this head are qualified by the condition that the judgment pleaded "as an adjudication of the matters and things in said amended, original bill alleged" has deprived complainants of their property without due process of law and of the equal protection of the law.

It is confidently insisted that the rule of *res adjudicata* has been misapplied below, and if so, of course the Constitutional point will be eliminated when that result is declared by this Court. The support for this point, however, will be found it that part of Judge WHEELER'S opinion (Vol. I, p. 92), where he says:

"Again, the plaintiffs would not be so concluded unless they had an opportunity to try the issue upon which their rights depended in a proceeding which would amount, as instituted and carried forward, to due process of law. If the case had been tried, as it is alleged to have been tried, without allowing an answer by these plaintiffs setting forth their rights, and an opportunity to bring evidence to support it, probably no one would now claim that they were concluded by the

judgment. Hovey *vs.* Elliott, 167 U. S. 409. As the proceedings went forward, the Special Term decided the case upon a ground which did not involve the determination of this issue of fraud in the procurement of the releases, and that court appears not to have in any way passed in any manner upon the question. The General Term is alleged to have decided the case upon other grounds without any finding upon that question and, this allegation is admitted by the demurrer. The Court of Appeals appears merely to have affirmed the decision of the General Term upon matters of law only. This alleged course of proceeding, which must be taken to be that had, left these plaintiffs without any opportunity to have this question tried in either court.

If the course of procedure cut off the right to try the question raised by the answer it would be as much short of due process of law as the decision of a case involving such a question without allowing an answer would be."

In support of this view we cite the following, other cases:

Castillo *v.* McConnico, 168 U. S., p. 683.

This authority points out the distinction between the binding effect of State statutes upon procedure and cases where a State statute, as construed, deprives the appellant of an essential of due process of law. If it be conceded that Sec. 1022 of the N. Y. Code allowed the General Term to adjudge the validity of the releases, although that question had been held by Judge Truax to be an immaterial issue and he had not considered it, then we have

the authority of the Court of Appeals of New York that such a provision is not one of procedure only, but one prescribing a tribunal unknown to the Constitution.

Benedict *v.* Arnoux, 154 N. Y., p. 726.
Rodgers *v.* Clement, 162 N. Y., p. 427.
Truesdale *v.* Burke, 145 N. Y., pp. 616, 617.

Such a decision of that issue being without authority, and being incapable of being authorized, according to the highest judicial utterances of the New York courts, cannot be collaterally upheld in the U. S. Circuit Court. Full faith and credit is accorded the Five College judgment, here, when it is restrained within the limits which the Court of Appeals have since decided such a decision deserves.

Reynolds *v.* Stockton, 140 U. S., pp. 264, 265.

The right to a trial of an essential issue by the judge of first instance is not a question of procedure, nor can any State statute make it such. That right is one of substance with which the 14th amendment is concerned.

Jacobs *v.* Marks, 182 U. S., p. 591.
Hagar *v.* Reclamation Dist., No. 108, 111 U. S., pp. 707, 708.
Truesdale *v.* Burke, 145 N. Y., pp. 616, 617.

III.

Assignments against the decisions upon evidence in support of the pleas whereby the several defendants overruled their pleas and converted them into answers, so that the case came on for final hearing, upon answer, replication and proof; and is here for decree upon the merits.

While there were issues raised under replications to answers, as well as upon replications to pleas and complainants were taking testimony against all, they adduced proofs in support of the bill as against the answers, upon the merits of the entire cause.

In view of the reason for the interposition of pleas, the avoidance of the need of going into evidence at large, it would seem that, where some defendants elected to answer, it was hardly worth while for others to file pleas. It was done, however, and complainants were under the necessity of taking their testimony under the 67th and 69th equity rules.

During the taking of this testimony, the defendants filing pleas passed outside the single point set up, and introduced evidence at large in the cause. This was objected to promptly by complainants, the attention of these defendants was called to the point, they were repeatedly warned that complainants would at all times insist that, by the course adopted these defendants were overruling their pleas and converting them into imperfect answers. The assignments set forth in the "Specification of Errors" under the point above, point out repeated occasions when this course was adopted by defendants.

It results from the premises that the state of this record is precisely as if the defendants had answered, had set forth by way of answer only the matters set forth in their pleas, and thereby admitted all the averments of the bill of complaint and had failed to make their pleas good or sustain their answers. In that case, obviously, the decree here ought to be for the relief prayed in the bills. Inasmuch as some of the features of the bills are set up in the alternative, complainants ought to have so much of inconsistent relief as they may elect and the decree here should allow them such election.

IV.

Assignments against the decision that the judicial views of Judge Lacombe must yield to the views upon an interlocutory appeal of Judges Wallace and Shipman, by which decision appellants have been deprived of the judgment upon matters of fact of the court of original jurisdiction, by an erroneous view of the law of the case.

Under this point it is insisted

(1.) That the Circuit Court of Appeals, which reversed the injunction order and took that occasion to decide that the law of the case was erroneously decided by Judge Wheeler, was unlawfully composed of Judge Wallace, sitting with one other judge, because he had previously heard the ques-

tion involved in the Circuit Court, and was disqualified by Sec. 3, of the Act of 1891.

(2.) That the review of the decision on demurrer under guise of reviewing the injunction order was not only an impropriety, but an excess of jurisdiction.

(3.) That the Judge at final hearing, having previously decided in support of the bill, following the law of the case, as decided upon demurrer, expressing as he did in effect that his views were unchanged, so that complainants were entitled by fixed principles to a decree in their favor, erred in waiving his own judgment under the impression that he was "constrained" to follow the decision of Judges Wallace and Shipman.

(4.) That the view that the decree under review is sustained by a decision of the Court of original jurisdiction is, thus, as erroneous as the idea that the Five College judgment is sustained by the due exercise of judgment by Judge Truax.

(1.) *The question is whether a Circuit Court of Appeals composed only of two Judges, one of whom is directly within the disqualification declared by this Court in the case of*

Moran *vs.* Dillingham, 174 U. S., 153,

should assume jurisdiction to decide *the vital question* to the order reviewed and the cause, which that Judge had already decided in the Circuit Court, *upon what is substantially a cross-bill* to the original bill; *indirectly* thus *reversing* the solemn *decree* of the Circuit Court (Wheeler, J.) to the contrary *on demurrer.*

The Court of Appeals, in order to decide that question, departed from a settled rule by reversing, upon appeal *from an order,* the decree of the Circuit Court overruling a demurrer to the bill.

Petitioners were compelled on the argument to assume, under previous authority, that the QUESTION decided by Judge Wheeler upon demurrer would not be reviewed upon a subsequent appeal from a mere order. That assumption was overthrown when the *opinion* of Judge Wallace upon the injunction appeal was filed, and petitioners forthwith and at the first opportunity, before the opinion was given judicial form, submitted an affidavit and objection to the jurisdiction,—which was disregarded. Complainants, *upon the first opportunity* after the promulgation of Moran *vs.* Dillingham *came here* to pray that whatever judgment might ultimately come here for review might be reached by the pathway of judicial propriety and statutory limitation; and that they should not be compelled to await a final decree in order to secure the right to be heard, at each step, by a qualified Court. This Court refused our application for a writ of *certiorari,* as is understood, because it was regarded as an application for an interlocutory review. Certainly the Circuit Court of Appeals has been repeatedly advised that this Court looked with disfavor upon interlocutory appeals.

This Court laid down the principle in Moran *v.* Dillingham, which in this instance required that *the question of the binding force of the judgment* of the State Courts *"upon the fund"* involved in the present litiga-

tion should, in the Circuit Court of Appeals, be decided "by Judges uncommitted and uninfluenced by having expressed or formed an opinion in the circuit court in the *first* instance."

It will appear from Judge Wallace's opinion, reversing Judge Lacombe's injunction order (91 Fed. Rep., 722; Record, Vol. I, p. 103) that the decision proceeded upon *a review* of the question previously decided upon demurrer by Judge Wheeler, as to the effect of the judgments in the State courts, by way of bar to the relief prayed by the present bill.

Judge Wallace formed and expressed the opinion upon the injunction appeal.

That *the essential question* in the State courts *was the right to the fund* now in controversy;

That the right thereto was adjudged to be in the colleges named in the ninth clause of Mr. Fayerweather's will;

That the executors, Ritch, Bulkley and Vaughan were required by that judgment to pay and distribute the same accordingly;

That if any consideration of the right to the fund were permitted, Ritch, Bulkley and Vaughan might have to pay twice.

That the judgment was conclusive "upon the fund."

That all dependent questions leading to the conclusion, not only actually litigated, but which could have been litigated in the action, were *res adjudicata.*

That any failure of the State courts in fact to decide upon which litigants' rights rested, was one of those infirmities in the administration of

human justice which suitors must bear with such equanimity as they could, in order that there should be an end of litigation and to the end that the Republic might be benefited;

And that the idea of Judge Wheeler that courts might look behind a judgment awarding the property, and inquire whether the Court *had ignored the issue* upon which the law devolved the title, was "preposterous."

We now, at this time and place, ask this Court to decide that Judge Wallace was not right; but also to say that he ought to have left it to another Judge to say or disaffirm all this. *He had already said the same thing in Landon* vs. *Bulkley, which is substantially a part of this case.*

The counsel for our opponents *submitted Judge Wallace's opinion* to Judge Wheeler *as conclusive upon him,* while the latter had the demurrer to our bill under advisement. *They claimed* that *the question* covered by Judge Wallace's opinion was *not* distinguishable from the question then under advisement by Judge Wheeler.

When Judge Wallace applies to Judge Wheeler's opinion the term "preposterous," he appears to resent the liberty which Judge Wheeler took in declining to follow Judge Wallace's formed and expressed opinion upon the very question.

Landon *v.* Bulkley, wherein Judge Wallace's Circuit Court opinion was, in point of form, delivered, was a demurrer, to a bill in equity, filed by the assignee *pendente lite* of Union College, which was a defendant in the bill filed by petition-

ers herein. Union College had set up by cross bill the same matters embraced in Landon's bill. Then Union College assigned to Landon.

In Landon's suit, complainants were named as defendants. The *only* difference in parties was the *transposition* of defendants with complainants. So far as the residuary estate was concerned *the same "fund" was in contest.* The decision rendered by Judge Wallace sustained the demurrer to Landon's bill. That decision left the victory *concerning "the fund"* with those who are appellees in this suit. A review by *certiorari* of the judgment so rendered was sought here and refused. 176 U. S., 685.

They considered that they had won, upon the question.

They sent a copy of Judge Wallace's opinion to Judge Wheeler;

And they insisted that Judge Wallace *had made a decision in Landon* vs. *Bulkley* which *Judge Wheeler was bound to follow* in Fayerweather *vs.* Ritch.

In their brief in the Circuit Court of Appeals they *cited* to Judge Wallace *his own opinion in Landon* vs. *Bulkley as decisive* of the question which he was then called upon to consider in the Court of Appeals.

He agreed with that view, and decided accordingly.

It is obvious that he was committed upon the question, and the language which he uses concerning Judge Wheeler shows that he was influenced by *his own* previous decision.

It may not be out of place to look for a moment at the method by which Judge Wheeler's decision upon demurrers was reviewed in this cause. In granting the injunction Judge Lacombe accepted Judge Wheeler's decision upon the demurrers, as he was bound to do.

As was said by COXE, J., in Wakelee *vs.* Davis, 44 Fed. Rep., 533:

"It is true that, in deciding the issues presented "by the demurrer, the Court spoke through an- "other Judge; but the law there enunciated is "not merely the individual opinion of the Judge "who presided; *it is the law of this Court,* to be "followed upon similar facts, until a different rule "is laid down by the Supreme Court. A re-exam- "ination and discussion of the question involved "is, therefore, unnecessary, for the reason that *the "Court is constrained to follow its former deci- "sion.*"

In Florida Construction Co. *vs.* Young, 11 U. S. App., 685, the Court, by WALLACE, Circuit Judge, said:

"We ought not to attempt to review indirectly an order or decision which we are not permitted to review directly."

It is thus apparent that the interest which Judge Wallace felt in the question before him, and his previously formulated opinion in the Circuit Court thereupon, led the Circuit Court of Appeals to depart from orderly procedure and precedent, and indirectly to review and reverse

Judge Wheeler's contrary opinion. The violation of the principles asserted in

Moran *vs.* Dillingham

would have been no more obvious, had Judge Wheeler sat in the Circuit Court of Appeals, and, *mutatis mutandis,* disposed of Judge Wallace's opinion in *Landon* vs. *Bulkley.*

It does not distinguish the "question" to say that it is given a different, particular application in the Landon case from that upon appeal in the principal cause.

The claim of Union College involved in the Landon case was not to a specific bequest; Union was not named in the will, or in any codicil; Union claimed only as a donee, under a deed of gift: made by the executors as individuals claiming to be absolute owners of the residue, namely, of the *whole* fund in question.

Union was one of about thirty such donees of that Fund—all named in that deed of gift—but with no *particular* property pointed out, which was to come to Union, or to anyone else, or to which it could lay claim as against all others.

As to the Parties and the Fund.

Judge WALLACE, in his opinion in said Landon *vs.* Bulkley, says that "*the parties* and the Fund "in controversy *are the same here* as they were "in the *former* action."

Therefore the parties and the fund were the same in Landon *vs.* Bulkley and in Fayerweather *vs.* Ritch.

And in his opinion at the Appeals, referring to the State Court action, he says:

"The decree was rendered in an action, to "which all the parties in the present suit were "parties, brought to determine their right *to the* "*Fund now in controversy.*"

As to the scope and effect of the State Court decision, his expressions upon Appeal and below, come near being identical.

For, in the Court of Appeals opinion, he says (Vol. I, p. 103):

"We are unable to doubt that the former judg- "ment is an estoppel and a finality, not only as to "every matter which was offered and received to "sustain or defeat the respective claims of the "parties to the fund, but also as to any other "admissible matter which might have been offer- "ed for that purpose."

And, in his opinion in Landon *vs.* Bulkley, he says:

"That judgment is conclusive upon the question "of the rights of the trustees of Union College "*and upon the fund* and the complainants—their "subsequent assignee—not only in respect to all "matters which were actually litigated, but also "in respect to all other matters which could have "been litigated in the action."

As to who owned the Fund.

In his opinion in the Circuit Court of Appeals, Judge WALLACE said (Vol. I, p. 103):

"It is plain that, by the judgment of the State "Court, it has been determined that the Fund now "in controversy equitably vested in the various "corporations made legatees by the ninth clause "of the will, and did not, as to any part of it, be- "long to the complainants."

And in his opinion in Landon *vs.* Bulkley, he says:

"The question of the right of the latter to the "Fund now in controversey was finally adjudged, "it being decided that the institutions named in "the ninth clause of the Fayerweather Will were "entitled to the same, to the exclusion of Union "College."

The pith of Judge Wallace's opinion upon appeal then is

1. That the fund belonged to the twenty colleges (named in the ninth clause of the will).

2. That the State Court decision to that effect is *res adjudicata.*

And the pith of his opinion in Landon *vs.* Bulkley is

1. That the fund belonged to the twenty colleges.

2. That the State Court decision to that effect is *res adjudicata.*

He has thus decided—in *both* opinions—

a. That the parties and the Fund in controversy

were the same in Landon *vs.* Bulkley as in the State Court action.

b. That the State Court judgment is conclusive upon the Fund—upon everything litigated and litigable in that action.

c. That the Fund belongs to the twenty colleges.

d. That the State Court decision to that effect is *res adjudicata.*

In our Original Petition for the writ, on file in this Court, it is alleged:

"The said the Honorable William J. Wallace, "Presiding Judge, stopped complainants' argu- "ment, and *confined counsel* for complainants to "the discussion what, if any, circumstances ex- "isted to *remove* the pending appeal from the "operation of the principles discussed in his said "opinion of Landon *vs.* Bulkley.

"It was apparent upon the argument that the "Presiding Judge considered the question to be "*the same,* and to be *concluded* to his satisfaction "by the consideration thereof in Landon *vs.* Bulk- "ley.

"He said so in substance and effect."

Complainants have been aggrieved, in that this review of an injunction order which was made to involve the equity of their bill—and the determination of which equity by the Circuit Court of Appeals, *controlled all subsequent steps in the cause until it reached this Court.* The decision so reached should be restrained within bounds by the exercise of its present juris-

diction, to disapprove a decree not rendered upon due process of law, for the action of the Circuit Court of Appeals was certainly open to that criticism, as are all dependent decrees.

They insist—if it be not temerity to insist—that they were entitled to judicial consideration from a Court of Appeals *duly qualified* under Moran *vs.* Dillingham.

(2.) *The review of the demurrer under guise of reviewing the injunction, was unauthorized.*

Inasmuch as a final decree upon the question underlying the injunction was reviewable in the Supreme Court, the incidental interlocutory questions also involving them, should not have been considered by the Circuit Court of Appeals.

Carson *vs.* Powers' Exrs., 52 U. S. App., pp. 634, 635-637.

U. S. Rubber Co. *vs.* American Co., 53 U. S. App., p. 448.

In re Chapman, 156 U. S., pp. 216-218.

American Const. Co. *vs.* J. R., 148 U. S., p. 383.

McLish *vs.* Roff, 141 U. S., pp. 667, 668.

The right of review of the order was subject to the general condition that the authority conferred must be exercised agreeably to the principles and usages of law.

Ex parte Royall, 117 U. S., pp. 247, 251.

Concerning the cases which have sustained an appeal from an injunction order as a review of the whole case on its merits, it is sufficient, at present, to recall that those cases deal with the inconvenience of postponing a review of the case on its merits, *after final hearing*, until an account, sometimes long and expensive, shall have been taken, when the principal question is whether the equity of the bill is sustained.

Careful examination of those authorities will show that where the equity of the bill has been reviewed on the merits upon appeal from an injunction order, the order has not been one upon affidavits preliminary to the hearing, but has been one embodied in substantially an interlocutory decree.

U. S. Rubber Co. *vs.* Amer. Oak Lea. Co., 53 U. S. App., p. 448.

In such cases where the witnesses have been cross-examined and all the proofs in the cause have been taken, the Circuit Court of Appeals might well review the merits with injustice to no one and convenience to all.

Richmond *vs.* Atwood, 5 U. S. App., pp. 168, 169.

Nothing could be more forced or improper, as an application of those authorities, than to enter upon an inquiry, upon appeal from a preliminary injunction, upon affidavits, while all the rights of amendment and the right of cross-examination were yet open, and yet to come. An in-

quiry which would result in a practical dismissal of the bill for want of equity.

Richmond *vs.* Atwood, *supra*, p. 169.
Highland Ave. *vs.* Equipt. Co., 168 U. S., p. 632.
Florida Cons. Co. *vs.* Young, 11 U. S. App., p. 685.

Therefore, the appeal in the Circuit Court of Appeals, "agreeably to the usages and principles of law," could properly be entertained only so far as to consider whether the Circuit Judge abused his discretion.

Richmond *vs.* Atwood, 5 U. S. App., pp. 168, 169.
City of Newton *vs.* Lewis, 49 U. S. App., pp. 269, 270.
Southern Pac. R. *vs.* Earl, 48 U. S. App., pp. 719, 720.

That court could only review Judge Lacombe, not Judge Wheeler. The rule is for the Appellate Court to put itself in the place of the Court below.

The Court below had committed no error, unless it be error to follow the adjudged law of the case until it is directly reversed upon appeal.

City of Newton *vs.* Lewis, *supra*, p. 269.

Before the motion for an injunction had come on to be heard, it had been solemnly adjudged upon demurrers interposed by these appellees, and by a Judge other than the Judge who granted the

injunction, that the bill of complaint stated a valid case for the relief demanded. If that decision was to be followed, assuming, as the decision required, that a fund, the title to which had not been so adjudged as to affect the complainants, was to be disposed of by the Circuit Court in this suit, it can hardly be denied that it was the obvious duty of a chancellor to preserve the *status in quo;* to protect the fund by injunction if not by a receivership.

Carson *vs.* Powers' Exrs., 52 U. S. App., p. 634.

Judge Lacombe refused a Receiver, but granted the injunction, avowedly to preserve the *status in quo.*

What else could the Court have done? Review the decision of another judge of co-ordinate jurisdiction and overrule it? That is, baldly, what the Circuit Court of Appeals was then asked to decide that the Court below should have done. What an unseemly contest between judges of co-ordinate jurisdiction in the same Court would result! The parties would not have been permitted to raise the question again, after demurrer, by a plea, according to correct practice. But it is claimed they could do it by affidavits, without a plea or answer. There was no pleading before the Court in answer to the bill when the injunction order was made. The demurrers had been overruled, and no subsequent pleadings had been filed or were presented. What common, judicial comity and seemly procedure required Judge Lacombe to do, the Circuit Court of Appeals was asked, upon its own view

that Judge Wheeler was wrong, to condemn. That it *did* do. Thus indirectly reviewing the decision on demurrer which the law does not directly permit, under guise of a review of a discretionary order.

That Court therein has condemned itself in terms which leave but little more to be said.

See Florida Const. Co. *vs.* Young, 11 U. S. App., p. 685.

The present contention has the approval of this Court, in

Highland Ave., &c., *vs.* Equipt. Co., 168 U. S., pp. 631, 632.

There was no new case made before Judge Lacombe as compared with that made before Judge Wheeler. In supposing so in his opinion (Vol. I, pp. 105, 106), Judge Wallace was clearly wrong.

The supposed "new case" was entirely immaterial in law. Judge Wheeler's decision upon demurrer that there had been no adjudication by due process of law to bind these complainants, is sought to be avoided by the facts alleged in affidavits to show that, although the Trial Justice in the State Courts omitted to decide the question material to dispose of complainants' rights *yet the General Term assumed to and did decide that question.* But that, if true, was an immaterial addition.

The latest authority upon the subject in the Court of Appeals confines the jurisdiction of the General Term to the functions of a Court of errors, and **denies that tribunal**

any power to decide facts which the Trial Court left undetermined.

Benedict *vs.* Arnoux, 154 N. Y., pp. 724, 727.

Such is the general law.

The complainants' right to a decision upon matters of fact by the untrammeled operation of the mind of the Judge of first instance, is inherent in the right to due process of law. See brief of CHARLES ANDREWS for complainants herein. Judge Lacombe said, in deciding this case (Vol. I, pp. 259, 260), "Complainants' arguments have failed to convince the Court that so far as the merits of the controversy presented by these pleadings are concerned, the pleas are not sound and supported by the proofs; he was constrained so to hold by the decision of the Circuit Court of Appeals upon the appeal from the order of injunction. It may be difficult to follow the reasoning by which that Court reached the conclusion that there had been an adjudication sustaining the proposition that the releases executed by the widow and next of kin were valid and not procured by fraud; but that conclusion was certainly reached and was expressed with no uncertain sound. No doubt the result of the litigation in the State Courts has been, by refined technicalities to render inoperative so far as this estate is concerned, the provisions of a statute which seems to be the conception of a wise and commendable policy, etc." Judge Lacombe then proceeded to hold that the added attack on the probate and will, are within the operation of the releases, and

that the judgment, which is held an adjudication by the Circuit Court of Appeals, that the releases are valid as to the residuary estate, establishes their validity for all other purposes. It is thus apparent that the decree below is the decree of Judge Wallace, that he forced it upon the Court below by hearing an appeal on which he was disqualified to sit, then by going outside the proper scope of such an appeal, by reversing the decision on demurrer. Will this Court content itself with deciding whether Judge Wheeler or Judge Wallace was right upon the abstract question, or will it insist upon due process of law in the Federal as well as the State Courts, and condemn the decree, upon that, as well as other grounds?

V.

Assignments impugning the rule of res adjudicata, as laid down by Wallace, J., in the Circuit Court of Appeals and sustaining the rule as applied by Wheeler, J., upon the hearing of the demurrers. Insisting upon the exceptions to the validity of the pleas, overruled under the constraint of Judge Wallace's opinion, by Judge Lacombe, upon the argument of the sufficiency of the pleas, and that the pleas were not supported by the proofs.

The sufficiency of the pleas to meet the entire case made by the amended bill by a defence consisting of a single point, to wit: *res adjudicata*, was attacked by exceptions thereto, and they were

set down for argument. Except in so far as the pleas were single to this point they were overruled; but their sufficiency being single to this point, as a bar to the whole case made they were sustained by Judge Lacombe under the constraint of Judge Wallace's opinion upon the injunction appeal (Vol. I, pp. 257, 259).

There is no such "constraint" here, and we submit that these pleas were invalid, as pleas, for the reasons following.

The pleas are bad for duplicity and are overruled by the answers.

It may not be amiss to state certain established rules of equity pleading concerning pleas.

The defendants, in avoiding the facts by a single plea, entered upon a course which, as Vice-Chancellor KINDERSLEY said, in

Hanby *v.* Richardson,

"is a very perilous experiment and is generally unsuccessful."

It rarely happens that a bill is filed, not being demurrable, to which the defense can be reduced to a single point. Heard's Eq. Pl. & Prac., p. 86.

What has in this instance, aside from the earmarks of Code pleading presented, tended, to make this experiment unsuccessful, has been the timidity of the pleaders. The obvious plea, called for to give effect to the views of the Circuit Court of Appeals upon the injunction appeal, *was to set up* in an anomalous plea *the fact referred to by that Court as a defect in the record*, which alone justified the decision on the demurrer, to wit: *that there was an exception filed to the decision of Judge Truax*, and then aver the former adjudica-

tion admitting the facts on the bill. But these timid pleaders were unwilling to admit anything.

The defendant who puts his hopes upon a plea must "let the facts averred in the bill go unchallenged and by plea set up some special matter which, if established, will defeat any recovery."

U. S. *v.* California &c. Land Co., 148 U. S., p. 38.

"The proper office of a plea is not, like an answer, to meet all the allegations of the bill; nor, like a demurrer, admitting those allegations, to deny the equity of the bill, but it is *to present some distinct fact, which, of itself, creates a bar to the suit*, or to the part to which the plea applies, *and thus to avoid the necessity of making the discovery asked for and the expense of going into the evidence at large.*"

Farley *v.* Kittson, 120 U. S., pp. 314, 315.

It is to be observed that the plea, at least in so far as it applies to *the case made to impugn the probate*, is a "pure plea", or in other words, it relies upon matter *dehors* both the bills, to bar the whole suit.

Story Eq. Pl., Secs. 651, 660.

The pleader, having entered upon that form of defense, was not entitled or called upon to make any answer.

Heard's Eq. Pl. & Prac., p. 91.
Story Eq. Pl., Secs. 670, 680, 685, 686.

He might, indeed, plead to part and answer to another part; but *having pleaded to the whole bill*,

any answer overruled the plea and was open to the criticism that, *instead of being in aid of the plea, it put in issue substantially the whole matter of the bill, while a plea is allowed, only to avoid doing so.*

In other words, besides setting up the adjudication at Special Term in the Five College action, in bar, by the pleas, these defendants by their pleas raise several distinct defenses, and by their answer miscalled "in support of the plea", put in issue several, distinct averments of the bill.

The extension of the answers, beyond the matter of the plea, is not protected by the Equity Rule, 37.

Grant *v.* Phœnix Life Ins. Co., 121 U. S., p. 115.
Heard's Eq. Pl. & Prac., p. 91.

The complainants are entitled to put the defendants to such a plea (unless they answer) as will admit the case made by the bill; not put in issue many of its substantial averments.

When that rule is violated, the paper placed on file is not disposed of by the label put upon it, but by its inherent character. Complainants may treat it as a multifarious plea and set it down for argument.

Story Eq. Pl., Sec. 654.

Or they may treat it as an answer.

When well attacked as multifarious it ought to be overruled.

Rhode Island *v.* Mass., 14 Pet., p. 259, Taney, C. J.

In the case of Hamilton College, complainants

treated the plea to the amended bill as an answer, and replied to it. If it is an answer in legal effect, then it will be treated as an answer; and, admitting so much of the bill as it does not meet, it can avail the defendant only so far as in law and equity it ought to avail it.

Equity Rule, 33.
Pearce *v.* Rice, 142 U. S., pp. 41-43.
Story Eq. Pl., Sec. 694.

So that if Hamilton's plea be too extensive as a plea, and, therefore, an answer, and yet not meet the entire bill, the consequence must be that complainants are entitled to such a decree in Hamilton's case, as the admissions, by silence, in Hamilton's pleading, of matters set up in the bill, plus the facts established by complainants' proofs, in equity require.

A plea, in short, being but a special and single reason why an answer should not be required, is overruled by an answer at large or one which substantially requires proof of facts not directly involved in the single matter pleaded as a bar. Such is the character of all these pleas and answers.

It is not every defense that would be sufficient in an answer that is sufficient to constitute a good plea.

Story Eq. Pl., Secs. 652, 653.
Rhode Island *v.* Mass,, 14 Pet., p. 259.
Korn *v.* Wiebusch, 33 Fed. Rep., p. 51, COXE, J.

For example. Hamilton's plea (Vol. I, pp. 176 to 186), which to be valid ought to have been confined to setting up the original judgment in the Five College action) sets up six, distinct adjudications, and

raises issues by the miscalled "answer in support thereof" upon the following matters set up in the bill:

1. That Hamilton asked the Supreme Court to hold that the rights of the parties did not require any consideration or decision of issues tendered by these complainants, as to the releases. In point of fact, Hamilton did so ask, and was sustained by Judge TRUAX. See Five College record, pp. 316, 339, fols. 1265, 1266, 1267, 1314, 1316. TRUAX, J., fols. 4213, 4214.

That suit was decided upon the contention of the colleges, sustained by the Court, that unless the Court should hold that the statute of wills *did* apply to the residuary estate and the alleged trust thereof for the colleges, these complainants had no interest calling for adjudication respecting the validity of their releases.

Complainants by this bill here contend that this success of the colleges in excluding all consideration by Judge Truax, of the releases, *as immaterial*, estops them from now asserting that the Five College judgment concludes that issue in another action. It was to all intents and purposes as if complainants' answers there had been stricken out. If their answers, or so much thereof as sought an adjudication of the invalidity of the releases had been stricken out, then controlling authority relieves them from any consequences here, of any pretended determination there of these issues.

Hovey *v.* Elliott, 167 U. S., pp. 414, 417, 443, 446.
Wheeler, J. (Record, Vol. I, p. 92).

The contention thus presented does not relate to

the principles of estoppel by judgment, but to that quite different principle of estoppel by conduct.

Bigelow on Estoppel, 5th Ed., p. 54, note 3.
Davis *v.* Wakelee, 156 U. S., p. 689.
Davis *v.* Cromwell, 68 Fed. Rep., p. 525.

To set up an estoppel by judgment is the proper subject of a pure plea.

To include therein a negative to an averment of the bill or thereby *creating an estoppel by conduct*, is beyond the legitimate scope of an answer in support of a plea which therefore overrules the plea and is equivalent only to an answer at large.

2. Hamilton's answer supporting the plea, but incorporated in it, denies that Judge TRUAX decided without considering or passing on the validity of complainants' contentions as to the releases, and that he omitted so to do. If the contentions respecting the releases had been *determined upon the merits* as matter of fact by Judge TRUAX, no one would contend that this bill would lie, so far as it covers ground triable and sought to be tried in the Five College action.

This traverse would constitute a negative plea, if it stood alone.

Story Eq. Pl., Secs. 667, 668.

In addition to the other averments, therefore, it renders the plea multifarious.

Rhode Island *v.* Mass., 14 Pet., p. 259.
Goodrich *v.* Pendleton, 3 John. Ch., 387.

8. The answer denies that the duty of the General Term was to require said issues to be considered and decided by the trial Court.

That is an averment upon which complainants are entitled to set up a claim that they did not, in the Five College action, have due process of law, that is "law in its regular administration through courts of justice"; but that it was an arbitrary exercise of power, unrestrained by the established principles of private rights and distributive justice. (Scott *v.* McNeil, 154 U. S., p. 45).

The Appellate Court was not free to affirm the judgment rendered by Judge Truax upon a theory *hostile* to the theory of the complaint.

The theory of the complaint in the State court was that no interest passed to the widow and next-of-kin; because the antecedent trust was valid. That was the theory sustained by Judge Truax. That claim was *hostile* to the theory that the trust was invalid; that all interest passed to the widow and next-of-kin; and that their releases conveyed title to the colleges. It was not enough that the releases were, in that complaint, referred to *diverso intuitu*. The title and the essential basis of the relief sought were not the same.

The law of New York is settled that, when an action is brought on one theory, and that theory sustained by judgment; and, upon appeal, the appellate court decides that the theory of the action is erroneous in law in its entire scope and meaning, that court is required to reverse the judgment and direct a new trial. Such obviously is the requirement of any just conception of judicial remedies.

Smith *v.* Platt, 96 N. Y., p. 637.

"It would follow that the case was tried on a

false principle and the whole accounting had on an erroneous theory. The sole remedy would be to reverse the judgment and order an accounting on a correct theory. But here we are met again by the plaintiff's position that he asks no new accounting and desires an affirmance of the judgment if we cannot modify it to his advantage. * * * Practically he asks this court to try the case over on a correct theory and itself render the increased judgment. We ought not to do that. The error, if it be one, goes to the root of the whole accounting and probably affects every finding which has been made respecting the refinery and its accounts, both of fact and law. FOR SUCH ERROR THERE IS NO PROPER REMEDY BUT A REVERSAL AND NEW ACCOUNTING."

Marshall, C. J., Crockett *v.* Lee, 7 Wheat., pp. 525, 527.
Watson *v.* Jones, 13 Wall., pp. 715, 716.
Wilmington &c. R. *v.* Elsbrook, 146 U. S., p. 302.
Hurtado *v.* California, 110 U. S., pp. 527, 528.
Hobson *v.* McArthur, 16 Pet., p. 195.
Munday *v.* Vail, 34 N. J. Eq., 418.
Bailey *v.* Knight, 8 Tex., 61.
Romeyn *v.* Sickles, 108 N. Y., pp. 650, 652.
Goodsell *v.* Western Union, 109 N. Y., p. 150.
Stevens *v.* Mayor, 84 N. Y., p. 305.
Southwick *v.* 1st Nat. Bank, 84 N. Y., pp. 428-429.
Arnold *v.* Angell, 62 N. Y., pp. 510-512.
Neudecker *v.* Kohlberg, 81 N. Y., 296, p. 301.

Barnes *v.* Quigley, 59 N. Y., pp. 268, 269.
Bradley *v.* Aldrich, 40 N. Y., pp. 509, 510, 511, 512.
Lewis *v.* Mott, 36 N. Y., pp. 398, 399.
Sixth ave. R. *v.* L., 138 N. Y., 551.
Maloney *v.* Moran, 49 N. Y., p. 115.

Under the plea of *res adjudicata*, the actual theory upon which the action was tried is a question of fact not concluded by the formal record. It is nothing to the purpose, therefore, to meet an allegation that the issue was not decided, by setting up the record in bar. A false issue is tendered thereby.

C., B. & Q. R. R. *v.* Chicago, 166 U. S., pp. 234, 235.
Hovey *v.* Elliott, 167 U. S., p. 444, 445.
Bissell *v.* Spring Valley Township, 124 U. S., p. 231.
Jones *v.* Jones, 12 Pa. St., 350.
King *v.* Chase, 15 N. H., 9, pp. 13, 15, 18, 19.
Wilson *v.* Dean, 121 U. S., 525.
Cunningham *v.* Foster, 49 Me., 68.
Hickerson *v.* Mexico, 58 Mo., 61.
Russell *v.* Place, 94 U. S., 606.
Wood *v.* Jackson, 8 Wend., 9.
Egan *v.* Hart, 165 U. S., 188.
Young *v.* Black, 7 Cr., 565, 567.
Parker *vs.* Thompson, 3 Pick., 429, p. 434.
Wheeler *v.* Van Houton, 12 John., 311.
Briggs *v.* Wells, 12 Barb., 567.
Scott *v.* McNeal, 154 U. S., pp. 43-46.
O'Donoghue *v.* Boies, 159 N. Y., pp. 98, 99, 100.

The averment being in substance that complainants were deprived of a trial, and that such deprivation was not in accordance with "law in its regular administration" in New York, a denial of those facts is proper for a single, negative plea; but its addition to a plea by way of answer renders the plea double and multifarious, or overrules the plea.

4. Hamilton's supporting answer denies that the General Term by fictions of law, imputed to Judge Truax that he *had* decided the issues upon the validity of the releases, in the face of the fact that he had *not* decided those issues, and that the General Term pretended to adjudge that there was not a sufficient preponderance of evidence to attack the releases to justify a reversal of the imputed decision.

In other words, the issue was decided only by the General Term. This averment is equivalent, in view of the later decisions of the Court of Appeals concerning the powers of the Appellate Division, upon exception to a general "decision" to an averment that the only determination of those issues was had by a Court "unknown to the Constitution and the law for the trial of causes." The exercise of such functions upon appeal is so described in

Benedict *v.* Arnoux, 154 N. Y., p. 726.
Snyder *v.* Seaman, 157 N. Y., pp. 452, 453.
Story on the Constitution, Sec. 1761.
Elliot's Appeal Procedure, Secs. 16, 17.

It was contended below that if the answer be now made that it is the intention of the pleader to rely both on an adjudication (1) by the judgment at

Special Term, (2) at General Term, (3) by the judgment of the Court of Appeals, (4) by the denial of the motion to amend the remittitur, and (5) by the Surrogate's decree and (6) accounting, that makes the plea double. The plea then sets up separate adjudications. These averments of matter, subsequent to the original judgment relied upon, have no legal connection therewith ; but are a denial of matter proper only to be met by answer. The answer for that reason overrules the plea.

But Judge Lacombe dealt with complainants' contention in that respect by holding that the plea set up a single adjudication involved in the several steps stated (Vol. I, page 261). With that view complainants have no quarrel ; but they insist upon the consequences for which they are here contending.

5. The denial that the General Term did not exercise original jurisdiction, in other words the assertion that the General Term *did* exercise original jurisdiction, brings the plea within the condemnation above pointed out, "4 ". The plea being ambiguous, is construed against the pleader (Heard's Eq. P. & Prac., p. 90).

The plea, therefore, must be taken to set up an adjudication at General Term, and the answer supports that construction of it.

But the assumption by the General Term of that power being unknown and unauthorized by the constitution and the law, for the trial of causes, the plea is bad in substance, for nothing valid can be based upon that unauthorized adjudication.

6. The denial that the Court of Appeals decided that complainants had no standing to have their rights adjudged, has no tendency to support the judgment at Special Term ; that is to say, no

legitimate tendency, any more than the denial of *any* feature of complainants' claim. It therefore overrules the plea.

7. The denial that the judgment is fraudulent is one which involves the widest consideration of the equity of the bill. It is an answer, and not an answer in support of the plea.

8. The denial of all confederacy is another denial which violates the principle, governing an answer in support of a plea, unless it can be regarded as conforming to Equity rule 32.

That rule expressly relates to *a plea to "such part"* as charges fraud and combination and requires that answer fortifying the plea to "such part". *This plea goes in bar of the whole bill.* Upon principle no plea showing a single reason why no answer should be made, can be followed by all these answers as to various particulars without overruling the plea.

Mitford, Eq. Pl. (Jeremy), 299, Story, Eq. Pl., Sec. 688.

There are in the other pleas the same, or additional, violations of the rule concerning an answer in support of a plea. Several defendants set up the original probate in 1891 as a part of the bar. These pleas were overruled as bad for duplicity (vol. 1, p. 258.) The counsel for those defendants realized that the bill as amended and the cross bill contain two independent claims. One resting upon matters assuming the validity of the probate, in part; and another attacking the probate *in toto.*

While that view of the theory of the amended bill and of the cross-bill is correct, it was fatal to the validity of those pleas not to apply that point

which relates to the judgment in the Five College action, to so much of the bill, and distinguish and restrict that part which asserts the effectiveness of the probate, to that part of the bill to which it relates. (Story Eq. Pl., Sec. 693).

But while the learned Judge below decided thereby that there were two defenses which could not be set up by a single plea, he did not give effect to the corollary that there were two distinct matters of claim, to both of which the remaining plea could not be a bar.

The averment in the pleas that the issues there were the same are not admitted by setting down the pleas, inasmuch as the complaint and answer in the Five College action are exhibited; and, by comparison with the amended bill, appear *not* to present the same issues. The averment of the plea in that respect is therefore controlled and overruled by the exhibit thereto.

Pac. R. *v.* Mo. Pac. Ry., 111 U. S., p. 518.

It appears, from so much of the Five College record as is thus presented, that the State Court did not have, and did not assume to have, jurisdiction to inquire into the validity of the wills and codicils; that it was not asked to decide any such thing; and that, if the parties *had* asked it to do so, that subject matter was beyond its jurisdiction which could not be conferred by consent.

The subject matter there was the construction of a will in the administration of a trust inseparably connected with that will and the determination of the claims to a residuary estate, so called by reason of the dispositions made by that will. This suit, in its probate aspect, is to nullify the very founda-

tion, the probated will; to deny the existence of the trust, and to establish another testamentary or statutory disposition; to avoid releases which grew out of and relate solely to the assertion of the title upon which the trust was there claimed to rest, and which are impeached when that title fails.

The pleas deny that the General Term confined its action wholly to the consideration of the errors in the record.

If that be so, then the General Term constituted itself a tribunal "unknown to the Constitution and the laws."

Benedict *v.* Arnoux, 154 N. Y., p. 726.

A plea of *res adjudicata* wherein the decision of the Court of first instance is alleged to have been superseded by the decision of a tribunal unknown to the constitution and the laws, is obviously bad in law upon its face.

2 Dan. Ch. Practice, 103, 104.
Emmott *v.* Mitchell, 14 Sim., 432, pp. 435, 436.

Again the plea alleges that the Special Term determined the issues upon the merits.

As a single anomalous plea that averment alone would be valid.

Story Eq. Pl., Secs. 660, 668.

But in an answer in support of this plea it vitiates the plea. It is an idle thing to rely upon a plea and also negative the very *gravamen* of the bill in an answer. The true and legitimate office of such a plea would be to assert the judgment upon the legal proposition that, no matter what the merits and whether the question of the release was decided,

as matter of fact or not, the original *judgment* was a bar and no inquiry behind it could be made. But the answer sets up that, upon inquiry being made, the fact is that there WAS a decision in point of fact upon the merits by the trial Court.

Story Eq. Pl., Secs. 653, 654, 655, 657.

Still again, the bill sets up the "decision", which the plea admits, *in haec verba.*

The "decision", as Judge Wheeler held, does not show that this issue was decided by Judge Truax.

The defendant must show that the very matter was actually decided.

The "decision" must set forth what it decides.

Bomeisler *v.* Forster, 154 N. Y., p. 237.
Galle *v.* Tode, 148 N. Y., p. 277.

The "decision" does not show that the matters herein, by the bill (Vol. I, p. 10, after fol. 20), set up, were actually decided.

The admission of the "decision" as pleaded, thus overrules the plea.

Dennison *v.* U. S., 168 U. S., p. 249.
Cromwell *v.* Sac County, 94 U. S., 351.

For these defects of form the pleas should have been overruled and the defendants required to answer.

THE PLEAS ARE BAD IN MATTERS OF SUBSTANCE AND FALSE AS MATTER of FACT.

Certainly, no principle of adjudication, no rule that what *might have been* adjudged in the State Court, is concluded elsewhere, can extend so

far as to conclude anything here *which could not, by reason of limitations upon the jurisdiction of the Court there*, have been considered and determined in the five-college action.

In this respect, our contention is that by reason of the distribution of remedies between the Surrogate and the Supreme Court, at the time the five-college action was at issue and tried, it was not within the competency of the Supreme Court therein to go back of the Surrogate's decrees admitting the will and codicils to probate, and to entertain any contention inconsistent therewith. *Pro hac vice*, the decrees of the Surrogate were there conclusive; because, under the State distribution of remedies, the will could only be attacked in the Surrogate's Court, except in special circumstances. While these special circumstances did exist then and are relied on now, yet they were then not known or were so inadequately known, as not to suffice to make such a case as is here made upon subsequent disclosures.

This Court has (what the Supreme Court had not, in that action upon facts then known), co-ordinate jurisdiction with the Surrogate's Court, by this suit to entertain the contentions respecting the invalidity of the will and codicils and to nullify the probate for fraud, which might yet be made in the Surrogate's Court, but for its incapacity to deal with the releases.

Suppose, after the five-college action, which would lie and was conducted only *as a suit construing the will*, the Surrogate, in a proceeding under Section 2481, Subd. 6 of the Code, should have vacated his decrees, and decided that another will was the last testamentary act of Mr. Fayerweather. All rights arising upon the establish-

ment of another will to this estate would then have been a new title. No adjudication upon such new title could have been predicated against the judgment construing the will, when the will had thus become invalid.

These are propositions settled by this Court, in the most famous and hotly contested litigation in in the entire history of testamentary disputes, that over the Clark Will.

It remains established thereby that, not only is a claim asserted under one will, and after judgment against that claim, no bar to a claim asserted under another will affecting the same estate; but *that the "fund" is not the same;* that the title is not the same; and that the fact that the property is, in part or wholly, the same property, does not affect or modify these propositions or invoke the principle of *res adjudicata.*

Gaines *v.* Hennen, 24 How., 553, pp. 567, 571–572, 578, 579, 580.

The Court says:

"We will now show the difference as to the character in which Mrs. Gaines then sued and that in which she now does, in connection with the law of Louisiana, as to what constitutes a *res judicata*, and what does not. In the first, her demand was for 1/2 and 4/5 of another half of the property owned by her father when he died. She then claimed AS THF DONEE OF HER MOTHER to the 1/2, and as FORCED HEIR OF HER FATHER to 4/5 of another 1/2 of his estate.

NON SHE CLAIMS AS UNIVERSAL LEGATEE AND LEGITIMATE CHILD OF HER FATHER UNDER HIS WILL OF THE 13th of July, 1813."

* * * "The authority of the thing adjudged takes place only with respect to what was *the object of the judgment.* THE THING DEMANDED MUST BE THE SAME; the demand must be founded on *the same cause of action;* the demand must be between the same parties, and formed against each other IN THE SAME QUALITY." * * * Nothing was said in the first suit, of the claim of Mrs. Gaines UNDER THE WILL UPON WHICH SHE NOW SUES.

* * * The precise point was ruled in

Burt *v.* Steinberger, 4 Cowen, 563–4,

(that the defendant might have shown, if he could, that he had acquired a title since the former trial, or any title, OTHER THAN THAT WHICH HAD BEEN PASSED UPON IN THE FORMER TRIAL)."

See also

People *v.* Johnson, 38 N. Y., p. 65.
Dawley *v.* Brown, 79 N. Y., pp. 398–400.
De Graaf *v.* Wyckoff, 118 N. Y., p. 6.
Canerdy *v.* Baker, 55 Vt., 582.
Fifield *v.* Edwards, 39 Mich., 264.
Baker *v.* Rand, 13 Barb., 152.
Railroad Co. *v.* Bixby, 57 Vt., 548.
Batker, &c. *v.* Belknap's est., 27 Vt., 700 S. C., 39 Vt., 168.
In re Chickering, 56 Vt., 82.
Wood *v.* Griffith, 1 Miss., 35.
3 Dan Ch· Pr., 2d Am. ed., 1679.
Standish *v.* Parker, 2 Pick., 20 & note 2.
Outram *v.* Morewood, 3 East, 346.
Sloane *v.* Truro, 6 T. R., 607.
Blakemore *v.* Gla. Can. Co., 2 C. M. & R., 133.
Hibsman *v.* Dullebin, Exr., 4 Watts, 190, Gibson C. J.

It is obvious that the "residuary estate under the will of 1884" which was alone in controversy in the Five College Action, is not the same "fund", in the legal sense, as the entire estate of Daniel B. Fayerweather, here involved under another and different will or in case of intestacy.

In the consideration of what was in fact decided in the Five College Action or what might have been there decided, regard must be had to the nature of that action and the extent to which, under the limitations upon remedies, in the State courts, the parties thereto *could* effectually attack the probate, establish the destroyed codicil, obtain discovery of its contents, or obtain any relief, incidental to and dependent upon these subjects of jurisdiction.

That action was brought under a head of jurisdiction in that court, repeatedly held to be wholly incidental to trusts. Its power to construe a will is merely incidental to its jurisdiction over trusts.

Mellen *v.* Mellen, 139 N. Y., pp. 217–218.
Anderson *v.* Anderson, 112 N. Y., 104, pp. 107, 108, 110, 113.
Chipman *v.* Montgomery, 63 N. Y., pp. 229, 230, 234, 235, 237.
Horton *v.* Cantwell, 108 N. Y., pp. 266, 267.

In the distribution of remedies in the State of New York, all questions of probate and of fraud on Probate Courts have been confided to those Courts and denied to courts of chancery.

Brady *v.* McCosker, 1 N. Y., 214.
Vanderpoel *v.* Van Valkenburgh, 6 N. Y., 190.

Post *v.* Hover, 33 N. Y., p. 602.
In re Tilden, 98 N. Y., 434.
In re Hawley, 100 N. Y., 206.
Mellen *v.* Mellen, 139 N. Y., p. 217.

The supreme court has no jurisdiction either by statute or as a court of chancery to entertain any attack upon the probate of a will for fraud in its procurement or to entertain any suggestions against the validity of the will itself, until the probate is impugned in a direct proceeding.

Post *v.* Mason, 91 N. Y., p. 550.
Sheridan *v.* Houghton, 84 Nr Y., 643.
Lewis *v.* Cook, 150 N. Y., 163.
Broderick's Will, 21 Wall., 503, pp. 519, 520.
Allen *v.* McPherson, 1 Ho. Lds. Cas., 191, 209.
Kalish *v.* Kalish, 45 App. Div., pp. 530–532.

In the Five College Action no allegations could be entertained, not based upon the assumption of the validity of the will, its codicils and their probate.

Chipman *v.* Montgomery, 63 N. Y., pp. 229 to 237.

It was upon that theory alone that the Five College Action was conceived and conducted, and the judgment, to effectucte the conclusion reached, was made.

The interjection into that action of a demand that the Court should avoid the probate, would have been met with the reply: "That power is exclusively in the Surrogate."

If the next-of-kin had invoked the power conferred by Section 1861 to establish by action a destroyed will, the court would have replied: "The probate is conclusive until set aside by the Surrogate; there can be no new will while the probate of that established remains in force; the demand is so foreign to the action as not to be within the scope of any counterclaim."

Vanderpoel *v.* Van Valkenburgh, 6 N. Y., 190.
Chipman *v.* Montgomery, *supra.*

That was a case very much in point. In that case the plaintiffs attempted to accomplish by action exactly what, it is contended by defendants here, it was competent for complainants to do by answer or counterclaim in the Five College Action. In the words of the opinion:

"Under cover of an action, in form for the construction of the will of Chipman, the ancestor of the principal contestants, it is sought to overthrow the will and establish the right of the plaintiffs to share in his estate as in case of intestacy. The object of the action is to nulify and destroy, and not to ascertain the true intent, and to carry into effect the purposes of the will, and is without a precedent."

Beyond dispute a demand which could not be maintained as the subject of an action could not be an effectual counterclaim.

Nor were these complainants under any obligation to present any such contention in that action.

The present contention was so far independent of that made by the colleges as to entitle complain-

ants to withhold it there and bring a separate action upon it.

Inslee *v.* Hampton, 8 Hun, p. 232.
Gillespie *v.* Torrance, 25 N. Y., p. 310, 311.
Siemon *v.* Schurck, 29 N. Y., foot of p. 613, 614.
Brown *v.* Gallaudet, 80 N. Y., 413, p. 417–419.

Such was the effect of Judge Truax' holding that the issues which they there tendered were immaterial.

Stark *v.* Starr, 94 U. S., 477, p. 485, 486; and see opinion in Circuit Court in record on file here.

This Court says:

"Having required the complainants to proceed in that suit only upon one cause or ground for relief, the court left the other cause open for any future suit which they might choose to bring".

The rule that *what might have been* determined is included by judgment, relates only to relevant matters involved in the judgment and affecting the issues tried; not independent and counter claims.

In so far as the validity of the releases and of the concomitant agreements was involved in the adjudication of title to the "residuary estate," it might be assumed that the adjudication of the "title to that fund," in harmony with the views of the Circuit Court of Appeals upon the injunction appeal, was no longer open.

But the pleas are to the whole bill, and are not saved by being good to only part of it. The con-

cession would have no effect upon the new case made in the amended bill and cross-bill.

Complainants contend that the doctrine there announced by Judge Wallace was misapplied and carried beyond its legitimate application in the Circuit Court.

Complainants urge that a recognized distinction be not overlooked, between the adjudication of *the disposition of the residuary estate under the will* there presented for construction, and matters which were only incidentally involved therein.

Conceding, for argument's sake, that the title to the *residuary estate, as such*, is adjudged and cannot be re-examined; it does not follow that the *validity of the releasess* can not be, independently, here examined and given effect, as the court may here determine upon the merits, apart from any dealing with the property, as a "residuary estate under the will of 1884."

The rule invoked in that connection by complainants is established by many authorities.

Dennison *v.* U. S., 168 U. S., p. 249.
Bissel *v.* Spring Valley Township, 124 U. S., p 231.
Reynolds *v.* Ætna Life Ins. Co., 160 N. Y., pp. 651-655.
House *v.* Lockwood, 137 N. Y., 259, pp. 268, 269.
Dawley *v.* Brown, 79 N. Y., p. 398.
Fifield *v.* Edwards, 89 Mich., 264.
King *v.* Chase, 15 N. H., 9.
De Graaf *v.* Wyckoff, 118 N. Y., p. 6.

In Dennison's case, this Court asserts the limitation upon the case of Cromwell *v.* Sac County, as follows:

"Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, UPON THE DETERMINATION OF WHICH the finding or verdict *was rendered*.."

In Bissell's case, this Court says:

"In Cromwell *v.* County of Sac., 94 U. S., 351, we drew a distinction between the effect of a judgment as a bar or estoppel against the prosecution of the second action upon the SAME CLAIM OR DEMAND, and its effect as an estoppel in another action between the same parties *upon a different claim or demand*. In the latter case, which is the one now before us, we held, following numerous decisions to that effect, that the judgment in the prior action operates as an estoppel, only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. The inquiry in such case, therefore, we said must always be as to the point or question ACTUALLY LITIGATED AND DETERMINED IN THE ORIGINAL ACTION, for only upon such matters is the judgment conclusive in another action between the parties, upon a DIFFERENT DEMAND."

In Reynold's case, the Court of Appeals says:

"It must be regarded as the established law of this State that a judgment is not conclusive in a second action unless the same question was at issue in the former suit of which the Court had competent jurisdiction, and the subsequent action is between the same parties or their privies. The conclusive character of the judgment as a bar extends only to the identical issues which are tried in the former action, they must be the same in each action, not merely in name, but in fact and

in substance, and the party seeking to avail himself of a former judgment as a conclusive evidence or as a bar, in a subsequent action, must show, affirmatively, that the question involved in the second was MATERIAL AND DETERMINED IN THE FORMER; as a former judgment would not operate as an estoppel in a subsequent action, as to immaterial and unessential facts, even though put in issue and directly decided. It is final only as to facts litigated and decided, which relate to the issue, and the determination of which was necessary to the determination of that issue."

In Fifield's case, the bar of a former judgment was set up, it appearing that the plaintiff's claim had been pleaded as a set off, when he was defendant in a former action. The record itself of the former action was silent upon the point whether this set off was or was not allowed. The plaintiff was permitted to prove that the set off was rejected in the prior suit as immaterial to the cause of action there set up. The Supreme Court of Michigan says: COOLEY, J. "The objection to the recovery in the second action is: 1. That the demand involved in the suit having been once the subject of litigation in a suit to which all the parties to this suit were parties, and which was tried on its merits, and proceeded to judgment, and evidence having been offered in favor of the demand and a recovery claimed upon it, such previous judgment is an estoppel and it is wholly immaterial whether the demand was or was not sufficiently proved, or was or was not allowed." The Court held that there was no estoppel, saying:

"The estoppel does not depend upon the question whether justice was done in the first suit, but upon the merits having once been *considered and passed*

upon. But there can be no bar, if the demand to which by their evidence the parties directed the attention of the Court, and which the Court rejected, was not within the issue, and consequently could not have been allowed. The estoppel does not depend upon technicalities, but rests in broad principles of justice, and it can only apply when the party has had his day in court and AN OPPORTUNITY TO ESTABLISH HIS CLAIM. If, for example, the plaintiff in an action of assumpsit were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the ruling should be made rejecting his claim; the bar cannot attach, because, in law, whatever may have been the testimony, there could have been no recovery. Nothing would seem to be plainer than that no man could be barred by a judgment against him, *who was not, by the issue, placed in such a position that establishing his demand would entitle him to a judgment in his favor.*"

In Dawley *v.* Brown, the Court says:

"It is not the former recovery which constitutes the estoppel. *It is the decision of the question which was in contestation between the parties*, and the estoppel rests in ejectment as well as other cases, upon the familiar principle that when the same point has been litigated between the same parties and decided by a court of competent jurisdiction, it cannot be again called in question. To sustain a plea of a former action pending, it is conceded that it must appear to the Court that the first action is for the same cause as the second. This requirement is strictly enforced. It is not enough that the property in controversy in both actions is the same."

In King *v.* Chase, an action to recover certain hay and fodder in trover was met by a plea of *res adjudicata*, upon a judgment in a former action between the same parties, wherein the plaintiff had sought to recover certain oats. In both actions the plaintiff had rested his right upon a certain mortgage which was attacked in the first action as fraudulent and void.

The Court say (p. 17):

"The title which has been tried was only his title to the oats. The question whether the mortgage was fraudulent came up only incidentally, by reason of his relying on that as his title. But the mortgage was not the matter in issue. And while the finding is conclusive on the question of his title to the oats, it is neither conclusive, nor evidence, upon anything else, because nothing else was in issue.

It appears from this that it is important to apply the rule to what was in issue in the action and not to what was merely incidentally in controversy in the evidence. * * * The title to the property now in question has not been tried. If the plaintiff has no title to it but the mortgage the defendant may show that the mortgage was fraudulent by the same evidence by which that matter was shown before."

Nothing would seem to be more obvious than that the suit brought by the five colleges was one for the enforcement of a trust, arising out of an agreement between the decedent in his life time and Mr. Ritch that, if the legal title to the residuary estate should be conveyed by will to Ritch, he would so use his bare title as to effectuate the

wishes of Mr. Fayerweather in contravention of the Statute of Wills. He was planning so that the next of-kin should be unable to defeat the disposition of that part of the estate which fell within the prohibition of the Statute of Wills. The Court of Appeals draws that inference, for it says that the scheme was adopted because Mr. Fayerweather "realized that the forbearance of his relatives was a poor reliance."

It was also obvious that this scheme necessarily embraced the idea that, for success, it was essential that no right, title or interest should be conferred upon, or left open to the relatives. Any releases that could be obtained from them might be desirable, for so much as they might be worth, but the *gravamen* of the action necessarily was and was claimed to be a valid trust outside the will; a trust which was not testamentary, therefore not affected by the Statute of Wills; which was sustained by a title which cut under the devolution of title by descent, and which could, in no possible aspect consistent therewith, confer upon the relatives anything to release.

Nothing more inconsistent or hostile to the theory of that action can be imagined than to suppose that, even within the *implication* of the claim, as set forth in the complaint in the State Court, was the transfer, conveyance or relinquishment by the heirs, of a title which they could not possibly have, consistently with the complaint. When the plaintiffs in the Five College action averred that these releases were given with full knowledge of the validity of plaintiffs' claim and in consideration of *that* trust, they interjected into the bowels of the releases a vital poison, the moment it became ap-

parent that no such valid trust existed. It was equivalent to an assertion that these releases had been obtained by fraud, when it transpired upon the plaintiffs' own averments and proofs (as held by the Appellate Courts), that the trust, upon the faith whereof and in consideration whereof, as they were there asserting, the releases had been obtained, was condemned by the statute of wills.

But we are now concerned, not with what the State Courts ought to have decided; but with what it was that the Supreme Court, at Special Term, could and did, in fact, decide.

The claim thus characterized, limited and formulated, in the complaint, was consistently asserted upon the trial.

Thus, at page 316, of the Five College record (Record, Vol. V), our adversaries took the ground that *no issues* on our part were presented by any correct view of the nature and scope of the action.

When Mr. James first interposed in the trial, his right so do was challenged by the other counsel. They took the ground that the next-of-kin:

"Have no standing in this controversy until after the decision of the main question" (fol. 1265).

To this Mr. James said: "I suppose this case is to be tried as a single case."

Mr. Nash then put upon the record the contention upon which the decision was ultimately made by Judge TRUAX:

"I object that the widow and next-of-kin, *under the pleadings in this cause*, have NO STANDING IN COURT IN REFERENCE TO THE LITIGATIONS OF THE PLAINTIFFS TO ESTABLISH A TRUST for institutions different from those created by the deed of gift, and that their interest is ONLY CONSEQUENTIAL

upon certain decisions to be made or ultimately to be given by your Honor" (fol. 1267).

Mr. Parsons.—"I wish to have the same objection put upon the record on behalf of the clients I represent" (1267).

These objections were tentatively overruled; but they were finally sustained, both expressly by a ruling and also by the decision, as the opinion shows.

Thus, by the ruling at fols. 1314-1316, where the Court says:

"Perhaps it is proper to state what the views of the Court with respect to Colonel James' position are: Colonel James' clients were made parties to this action because one of them was the widow and the others the next-of-kin, of Mr. Fayerweather, and as such, IN THE ABSENCE OF THE WILL, would be entitled to this estate. IF THIS RESIDUARY LEGACY IS SET ASIDE, in whole or in part, as such widow or next-of-kin they would be entitled to the money. THAT THERE IS OR WAS AN AGREEMENT OF RELEASE BETWEEN THE EXECUTORS AND THEM IS IMMATERIAL. Because in this action when the release is proved they may avoid the release, the same as in an action for negligence, where the defendant sets up a release, and the plaintiff responds to it by saying the release was obtained by fraud. It is unnecessary for him to set up the making of releases or to attack the making of the releases in his answer. He could have done it *without having alluded to it in his pleadings.* These are my views upon the position of Col. James."

It is thus perfectly clear that the trial court did not deal with the issues here as substantive matters of claim upon pleadings, but only as evidence which might or might not be relevant to the com-

plainants' claim; and they were finally held to be immaterial and irrelevant.

Mr. Root contended (p. 339) that there were two questions to be passed upon: "The question as to the act of 1860; and, if your Honor should be of opinion that that act of 1860 APPLIES TO THESE INSTITUTIONS AND TO THIS TRANSACTION, THEN, is the further question as to who was entitled to distribution of the surplus of that one-half."

Judge TRUAX decided (Vol. IV, pp. 29, 47, 49, 50) that the question whether the claim of the plaintiffs can be maintained was one which depended upon the applicability of the Statute of Wills to the trust. From an elaborate discussion of authorities he deduced the result that the statute of 1860 does *not* apply. He concludes: "It seems clear to me that, if this trust was not created by will, it does not come within the prohibition of the statutes of 1860, and that it is a valid trust, and should be carried out by the residuary legatees."

Northwestern University was not a legatee in the will; but the colleges had consented to the application of a part of the residuary estate to pay her $100,000.

As to this Judge TRUAX says: "The Northwestern University is entitled to take, because the legatees mentioned in the ninth clause of the will, WHO ARE THE ONLY PERSONS IN THE VIEW I HAVE TAKEN OF THE LAW OF THIS CASE, INTERESTED IN ITS NOT TAKING, consent to its taking."

Referring to the moneys paid to Mrs. Fayerweather and the next-of-kin for the releases, the Judge says:

"In the view I have taken of the law of the case, that payment was made from the fund *that belonged to those institutions alone.*"

The only allusion to the issues here involved, the only basis for the claim that Judge TRUAX considered or decided the question of the validity of the releases and the concomitant agreements, is as follows :

"The view that I have taken of the facts and the law of this case renders it *unnecessary for me to consider* the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

Bear in mind the proposition established and last stated by the Court of Appeals in Reynolds' case, 160 N. Y., p. 651: "The party seeking to avail himself of a former judgment as conclusive evidence or as a bar in a subsequent action, must show *affirmatively* that the question involved in the second was material *and determined* in the former"; and the proposition stated in House *v.* Lockwood, that the adjudication is final only as to facts litigated and *decided*, having such a relation to the issue that their determination was *necessary* to the determination of that issue. Compare these authorities with what is shown, or not shown, as to the judgment rendered by the Supreme Court; and it is at once apparent that, outside the technical rule which is said to prevent any consideration here of title to the "fund" (the residuary estate), the judgment in the Five College action can have no force here as to the validity or invalidity of the releases or the concomitant agreements; as to the probate, or as to the establishment of the codicil of November 11, 1890, or any other will.

Nor does this result rest alone upon the correct application of the rule of *res adjudicata*.

There is an independent estoppel against the present pleas of these defendants in view of the

fact that it was upon their express contention above set forth, that these issues were not considered in the State court.

When a party succeeds in defeating an action by his pleading, by motion or the like, he cannot defeat a second action by taking a position inconsistent with that taken in the first.

Bigelow on Estoppel, 5th ed., p. 54, note 3.

When these defendants succeeded in their contention that these issues were not in that case, it was as if they had been withdrawn. They could not by fiction thereafter be regarded as decided.

In Davis *v.* Wakelee, 156 U. S., p. 689, the Court says:

"It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not, thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken."

In Davis *v.* Cornwall, 68 Fed. Rep., p. 525, the Court comments upon the last case, saying:

"The Court did not considor the case upon the rules applicable to the common estoppel which springs from the misrepresentation of a fact, but puts its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with Courts of Justice."

Nor is the rule which confines the operation of the judgment of the Supreme Court to the limits here contended for merely a principle of the general law. To conclude complainants here by that judgment upon matters not actually decided there;

but, on the contrary, there decided *not* to be within the issues tried, encroaches upon constitutional rights.

Reynolds *v.* Stockton, 140 U. S., 254, pp. 268, 269, 270.
Munday *v.* Vail, 34 N. J. Law, 418.
Hovey *v.* Elliott, 167 U. S., pp. 414, 417, 443, 446.
Jacobs *v.* Marks, 182 U. S., p. 591.
Third Natl. Bank *v.* Cornes, 1 Silvernail, p. 168.
Romeyn *v.* Sickles, 108 N. Y., p. 652.
Arnold *v.* Angell, 62 N. Y., pp. 510-512.
Southwick *v.* 1st Natl. Bank, 84 N. Y., pp. 428, 429.
Ferguson *v.* Crawford, 70 N. Y., p. 257.
Neudecker *v.* Kohlberg, 81 N. Y., p. 301.

The references in the complaint in the Five College action to the releases, were by way of inducement and *diverso intuitu*. That they were not set up as a source of title is manifest not only from the language used by the pleader, but from the theory of the action, which was characterized, by every possible mode of statement, as an action to enforce a secret trust, claimed to be valid because, and only because, it operated outside the statute of wills, as the assertion of a trust created in the lifetime of the decedent and which was fed by the title conveyed by the will of 1884 and its codicils.

That was the position taken and sustained upon the trial. It was sustained by the Judge's rulings, by his opinion and by the form of the "decision" which is silent upon the subject of the releases.

The ground first set up on appeal, to sustain the judgment, was a departure from the theory of the action, in its entire scope and meaning. It made that essential, which the trial Court held to be immaterial. It assumed that question, by technical presumptions in aid of the judgment, to have been decided, which the whole record shows was *not* decided, as matter of fact, and *could not have been decided*, consistently with what *was* decided.

The opinion of the Circuit Court ot Appeals that this substitution of causes of action upon appeal is within the operation, in New York, of "due process of law", that the contrary claim is "preposterous", that the judgment, so far as its operation upon the "fund" is concerned, embraces, and ends controversy upon, all matters essential to sustain that judgment, thus appears to be unsound.

That which adjudges is the judgment of the Court of first instance. Therefore, what *that Court* in point of fact decided, is the sole test of adjudication as to points collaterally or incidentally involved. To determine what *was* decided it must be considered what fixed rules of procedure permitted to be decided.

The mere fact that the complaint there contained such references to the releases, pleaded as inducement to a claim *inconsistent with title in the releasors* the question of the validity or invalidity of the releases not having been, in fact, decided by the trial Court, did not draw that question within the doctrine of estoppel.

Stowell *v.* Chamberlain, 60 N. Y., p. 275.

Barnes *v*, Quigley, 59 N. Y., p. 268.

Third Natl. Bank *v.* Cornes, 1 Silvernail, p. 168.

Romeyn *v.* Sickles, 108 N. Y., p. 652.
Neudecker *v.* Kohlberg, 81 N. Y., p. 301.
Brady *v.* Daly, 175 U. S., p. 160.

In Barnes *v.* Quigley the Court held that where the *gravamen* of the action is fraud, the Court cannot change its form and allow a recovery as in contract, although facts may be stated in the complaint *by way of inducement*, which might sustain such an action.

In the Third Natl. Bank *v.* Cornes, the Court says:

"The theory of the complaint was that the deed was fraudulent and void, instead of being valid and good. The defendant was not called upon to meet and answer a cause of action, not only absent from the pleadings; but entirely inconsistent with their allegations."

In Romeyn *v.* Sickles the Court says:

"If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary. It does not appear that the theory upon which this action was determined was mentioned or referred to upon the trial, and its first appearance occurs in the opinion of the Referee, wherein he says: 'It is true that, upon this view, the plaintiff recovers upon a somewhat different cause of action from that stated in the complaint'; and this is followed by the suggestion that 'the pleadings may be amended to conform to the proof'. This is to ignore the whole office of a pleading and compel parties to try their cases in the dark, informing them for the first time after

the wrong is irremediable of the issue which they should have tried."

In Neudecker *v.* Kohlberg the Court says:

"Notwithstanding the liberal rule of construction applied to pleadings under the code, I am aware of no case or principle upon which a plaintiff may recover, not only upon facts not stated, but upon evidence which disproves those which are stated. The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*."

In Brady *v.* Daly, it was contended that an action for statutory damages for violation of copyright was barred by the decree under a bill for injunction and damages. But the court points out that the relief sought in equity was not obtained and not considered, and holds that there was no bar, saying:

"As a portion of the relief complainants asked that the defendant be decreed to render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in regard to profits, no evidence was offered upon that subject, no finding was made thereon, and upon the coming in of the master's report no final judgment or decree for profits was ever asked or rendered. In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him."

It being thus evident that within the issues *actually* decided, the validity of the releases, or of the concomitant agreements was *not* decided as matter of fact, and was not *material* to the decision, in view of the law upon which the decision

was reached, it follows that their validity is here an open question.

In May, 1890, Mr. Parsons drew a will for Mary Edson which contained the provisions for a secret trust to avoid the statute which were condemned (and approved by the paradoxical opinion of the Court of Appeals) in the Five College Action.

In that will Mr. Parsons was executor, residuary legatee and the selected instrument of the secret trust (155 N. Y., pp. 561, 572). That will being probated, three suits were brought concerning it. The decision of the Court of Appeals shows clearly that the Circuit Court of Appeals, as viewed and followed by the Circuit Court, has given to the Five College judgment an effect as an adjudication which it could not have in the courts of the State where it was rendered.

In the first of these three cases (Fairchild *v.* Edson, 154 N. Y., 199), the executors of the will sought a construction thereof. This resulted in a judgment that certain legacies to institutions were void, as unlawfully suspending the absolute ownership of property; and as too indefinite for enforcement. It further adjudged that legacies to certain charitable institutions were within the prohibition of Chapter 319 of the N. Y. laws of 1848, being made less than two months before the testator's death.

In the second of these three cases (Edson *v.* Bartow, 154 N. Y., 199), brought by next-of-kin, the parties being the same, it was set up that the will had given to Mr. Parsons and his co-executors the residuary estate upon a secret trust arising from his and their promise to apply it in circumvention of the statute to the institutions prohibited. That the trust being void, it became impressed in equity

with a trust in favor of the next-of-kin. This contention was sustained as against Mr. Parsons' third of the *residuum;* although the other two were allowed to keep theirs because only Mr. Parsons had agreed to the secret trust. Mr. Parsons had testified in denial of the secret trust, but the Court of Appeals held that the decision of the General Term that there was such a trust and that Mr. Parsons was party thereto was sound and affirmed it.

154 N. Y., pp. 215, 216, 217.

The Court says:

"Considering the facts established at the trial it cannot be properly said that there was no evidence to sustain the conclusion of the Appellate Division to the effect that this residuary clause was a last effort, so far as Mr. Parsons was concerned, to aid his dying client in carrying out a testamentary scheme that was about to be defeated to a very large extent by her immediate death, and that he took his legacy resting under the implied promise to carry out her wishes. The express promise in words is not necessary—silent acquiescence and tacit consent have all the force and effect of a promise solemnly made in the presence of witnesses. * * * Starting out with this conclusion, based on the facts, the judgment against Mr. Parsons is sustainable on principle and authority. The effect of his agreement was to defeat the policy of the State as embodied in the general act of 1848, rendering void all legacies to charitable uses contained in wills executed less than two months before death * * *

It needs no argument to demonstrate that a secret trust having for its object the circumvention of this statute, is void." The Court in that case

justified the ordering of final judgment instead of a new trial, because it was apparent that the facts were all disclosed and, on a new trial they could not have been changed (p. 226). How different from the Five College judgment, where the mind of the trier of fact had never been addressed to the consideration of the issues upon which this great estate passed. The same court having declared that it could not settle a fact unless it had been found by the Trial Court.

Rodgers *v.* Clement, 162 N. Y., p. 427.

It was claimed in the second suit that the judgment in the first was *res adjudicata* (154 N. Y., p. 209), citing Cromwell *v.* County of Sac, 94 U. S., 122).

But the Court of Appeals held not so, approving of the reasoning of the Court below (10 Appellate Division, 104). The Court of Appeals says that, inasmuch as the first case dealt with the validity of the will on its face and therefore adjudged that the residuary clause was an absolute devise to the executors as individuals without limit or restriction, whereas, the second case sought to impress upon the legacy in the hands of these individuals by reason of extrinsic evidence a trust in favor of the next-of-kin, the rule of *res adjudicata* had no application.

Surely the successful plaintiff in the second suit might have interjected his claim into the first suit, and by Judge Wallace's rule the first judgment barred the second suit.

The third suit upon the Edson will is reported in 155 N. Y., 555. Therein it was sought in an action to subject the estate in the hands of the executors of the probated will to a trust arising out of an al-

leged agreement between the testator and her deceased sister to make mutual wills, which agreement was in hostility to the probated will. The defense of *res adjudicata* was therein set up. But the Court held that the relief obtained in the other suits was no impediment to that sought last. It is thus quite apparent that in New York the rule of *res adjudicata* is the reverse of that laid down for the effect of a New York judgment by Judge Wallace. Especially as his decision was extended by the Court below in bar of the consideration of the releases as an impediment in the way of assailing the probate.

The Appellate Courts were in the usual course of law in its regular administration under a settled duty upon deciding that the theory of the complaint and the conduct of the trial had been erroneous to reverse, not to affirm. To hold that the theory of the complaint, and of the trial justice were correct, was permissible error. But to affirm a judgment upon a decision against a declared error in the very foundation thereof was an arbitrary and not a judicial act. By such affirmance the courts of New York deprived complainants of any trial; for the trial reviewed was none, if it was conducted and our issues disregarded as the result of the declared error. The State Courts could not decide any facts not decided by the trial court without departure from their own settled rules.

Thus, in Benedict *v.* Arnoux, 154 N. Y., 715, there was decided adversely to their present contention the proposition which these defendants set up to show that the General Term on appeal adjudged the validity of the releases, under the authority of Sec. 1022, of the Code of Civil Procedure. In that case it appeared that Edwin Booth

had deposited with Arnoux, Ritch and Woodford, in his lifetime, $16,500, to be invested on bond and mortgage. Certain property was held by executors of Campbell, having a power to sell, but not to morsgage. A colorable sale was made to George T. Arnoux, William H Arnoux then loaned the money to his brother upon a mortgage upon the property. When foreclosure was sought it was sought to defeat mortgage by impeaching the sale as a device to defeat the will and as amounting to an unauthorized mortgage by the executors.

The Court of Appeals held that Mr. Arnoux's knowledge of the transaction was not to be imputed to Mr. Booth, who was entitled to rely upon the record title under the deed from Mr. Campbell's executors in apparent exercise of a power of sale. The Court holds that Arnoux's knowledge of the real character of the transaction, obtained in dealing with his principle's property for his private advantage, was not to be imputed to Mr. Booth ; that Arnoux's course was deemed to be in fraud of his principal, and that the mortgage was valid as to him. The Court reversed the judgment against Mr. Booth's executors, and it was urged to give effect to the decision of the Appellate Division upon same view, that in view of Sec. 1022 of the Code, the facts were to be deemed settled beyond the authority for any review. The reasoning of the Court in dealing with that contention excludes the possibility that the Court of intermediate appeal, whether General Term or Appellate Division, could lawfully have decided any fact which had not been considered and decided by the trial Court (see 154 N. Y., pp. 723 to 727)

In the case of

Wright *v.* Wright, 51 New Jersey, 475;
Record, Vol. IV, p 259,

affirmed by the Court of Errors and Appeals, p.637 one Henry B. Vaughan had purchased the interest of George M. Wright, of his brother-in-law in the estate of his father for $250, through the instrumentality of another, one Gibbs. This suit was brought to set aside the sale as obtained by misrepresentation and fraud. It was claimed, and the claim was sustained, that very large sums of assets were withheld from the inventory and secured by Vaughan while he was holding out that the estate was insolvent, and misleading the complainant so to believe. In that case the disparity between the actual property conveyed to Vaughan, and what it was represented to be, was sufficient to impugn the conveyance and require him to account. It was also intimated that the proceedings in the Orphan's Court, based upon the conveyance, might be attacked in that suit. Also that he might be compelled to convey realty for which he held title for the decedent who paid the purchase money, Vaughan having given an unrecorded deed back, which was destroyed when decedent was on his death bed. This case sustains much of the relief which complainants here seek. PITNEY, V, Ch., says:

"At the hearing it was urged on behalf of the defendant Vaughan that, as to what has been called the "suppressed assets," complainant stands *in pari delicto* with Vaughan and cannot ask aid from this Court.

I am unable to adopt that view for several reasons.

One is that it was not set up in the answer. That pleading alleges that there was no suppression—that the shares of the rubber stock and of bank stock were transferred for a valuable considera-

tion. The proof shows that they have all been distributed as a part of the estate, the bank shares having been first transferred by Vaughan to Mrs. Wright as administratrix, and by her distributed; and the defendant Vaughan, claiming as assignee of the complainant, received the share which would otherwise have come to the complainant. It seems to me that Vaughan, having received the share by reason of standing in complainant's shoes, which position he occupied as the result of a fraud practiced on the complainant, cannot now be heard to say that complainant was never entitled to receive it. Whatever defect was in complainant's title was waived by the administratrix when she recognized Vaughan as complainant's substitute and paid and distributed to him a share of the estate. The complainant was deprived, by Vaughan's fraud, of the opportunity to assert his right to it, and cannot now be told by the person who succeeded in receiving it that he could not have succeeded if he had not parted with his right to try.

With regard to the distribution of cash—that seems to have come from various sources; and it does not appear that any special distribution was made of the proceeds of the suppressed notes, etc. Then I am not satisfied by the evidence that complainant does not stand *in pari delicto* in the suppression of these assets. The brains of that part of the transaction were undoubtedly furnished by Vaughan, and the complainant merely acquiesced.

The bill was filed upon the theory that this interest of the complainant in his father's estate was held by Vaughan for the benefit of the next-of-kin. This may be so in point of fact, but it does not appear so in the evidence. That shows that

there has been from time to time a distribution, or rather several distributions, of the estate, some of it in specie, some of it in cash, and in that distribution it was divided into the original shares, precisely as if the complainant had not assigned his share, and the share which would have come to him was transferred to and paid to Vaughan. The complainant is at present, therefore, entitled to a decree setting aside the several transfers from himself to Gibbs, and from Gibbs to Vaughan, and for a reconveyance by Vaughan to him, in such manner as to pass title to real estate, and to an account against Vaughan of what he has received under the several distributions referred to.

The bill also prays for an accounting by the administratrix of her dealings with the estate, and that complainant may have the share in the estate which he conveyed to Gibbs. Mrs. Wright answers and sets up an accounting in the Orphans Court. Complainant in that situation *prayed for leave to amend his bill and attack that account.* I will hear counsel as to the propriety of such an amendment,

The bill also prays that Vaughan may be decreed to convey certain premises, not described or identified, situate in Bordentown, to the heirs of George M. Wright, deceased. The allegations on which that prayer is founded, and which are sustained by the proofs, are that in the lifetime of George M. Wright he purchased and paid for certain real estate in Bordentown (not described), and had the title conveyed to Mr. Vaughan and the conveyance recorded; that Vaughan thereupon made a conveyance to George M. Wright of the same premises, and delivered it to him, but that it was never recorded, and that on his death-bed that deed was

produced and destroyed. I will hear counsel, also, as to whether any relief can or should be granted in that respect in this cause, or whether the complainant, when there shall have been a reconveyance to him by Vaughan, should not raise the whole question by bill for partition of that and other real estate of which Wright died seized.

The complainant is entitled to costs against Vaughan."

The complainants adduced in evidence (Vol. IV, pp. 255 to 259) the testimony of the attorney who tried the case of Wright *v.* Wright, Mr. Westcott. The Court below sustained objections to it and directed that it be stricken out. It is submitted that complainants were entitled at least to Q. II. (Vol. IV, p. 258.) "What did Mr. Vaughan say upon that subject in your hearing?" This related to the disposition of the deed referred to in the Wright case. There was no objection made that Vaughan had not been interrogated on the subject under the rule in the Queen's Case; nor does the rule apply to a party, but only to a witness. As to the materiality of the answer, it does not appear (Vol. IV, p. 278) that it was material. The court below by actually expunging the answer disregarded the rule in

VI.

Assignments against the determination that the releases were any bar to appellants' case, even if the judgment pleaded, adjudged them to be valid, upon the facts since disclosed.

The releases run to executors of the last will of Fayerweather. That description involves a representation that they are such.

The amended and cross bills attack their capacity upon facts since disclosed. That is necessarily an assertion of a new title not barred by and not capable of being asserted in the former litigation.

The releases are executed by Morris B. Beardsley as attorney in fact for these complainants (Vol. IV, pp. 203, 210, 232).

The Complainant, Emma S. Fayerweather obtained such information as she had about the contest, the facts and the evidence from Mr. Beardsley (Vol. II, pp. 320, 321). She had no other soures of information (Vol. II, p. 221). She did not understand that she had any rights (Vol. II, p. 601). She was in complete ignorance of her rights and of the facts upon which they were held upon appeal in the Five College case, to depend (Vol. II, pp. 601 to 603). Mr. Beardsley proposed the settlement made, in a letter in which he said "that Aunt Lucy had made arrangemente to settle; but that he had made arrangements that he could get us $30,000 each for her sister, Mrs. Achter and herself, that this would be clear over and above attorney's fees and he thought that would be the best we could do and advised us to accept it." Mrs. Achter was then residing in Iowa where they were

born. She got such information as she had from Emma (Vol. II, pp. 603 to 604).

Mr. Beardsley had conflicting interests while he acted as adviser and attorney for the complainants. They arose as follows:

On the morning of the day of Mr. Fayerweather's death, Mr Vaughan obtained Mr. Fayerweather's signature to the letter of that date in which he directed Vaughan and Myrick to give Mrs. Beardsley securities now in his box of about $100,000, the securities taken at their value "of the day" (Vol. IV, p. 226). These were not delivered at the time of his death (Vol. II, p. 8). The letter was shown Beardsley by Vaughan (Vol. VI, p.).

The letter, of course, had no testamentary force and while it might have been valid as a gift *inter vivos*, it became inoperative when Mr. Fayerweather died. It was made effective, or the executors tried to make it effective, by the deed of gift (Vol. IV, p. 198, clause third). Meantime Mr. Beardsley, having to depend upon the good offices of the executors to secure this imperilled and handsome gift, endeavored to deserve it by acting in the interest of the executors and to persuade the women to acquiesce in their proposals. He received from Mr. Ritch a letter misrepresenting the facts and intimidating Mrs. Fayerweather (Vol. IV, pp. 243, 244).

Mr. Beardsley wrote to Vaughan in terms evincing his active participation in the adjustment as desired. The letter is as follows:

BRIDGEPORT, CONNECTICUT,
November 25th, 1890.

My Dear Mr. Vaughan.—I have received from Mr. Myrick sent at your request the amount of tax

and water rate. I would be obliged if you would ask Mr. Myrick this additional information.

Cost of hay, grain, etc. used at stables; for repairs etc. to harnesses, carriages, etc.; of pew at church; of heat at house and stables. In short I want information as will enable me to set down and show Aunt Lou what her running expenses (exclusive of table servants and clothes) will be apt to be. I AM ENGAGED IN THE EFFORT TO PERSUADE HER that SHE IS NOT LEFT POOR, BUT HAS BEEN LEFT SUFFICIENT TO LIVE AS UNCLE DID.

I enclose two bills, which I suppose you should have; and which Aunt Lou handed me yesterday while I was there.

I have sent my wife's waiver to Mr. Ritch; and have sent the one for her two sisters to them; and Aunt Lou promised to send hers yesterday.

There is an adverse influence from her family. But with Miss Joyce's help I feel sure that it will not avail.

Yours very truly,
MORRIS B. BEARDSLEY.

Under these circumstances the following authorities condemn these releases.

There is no absolute rule that a mistake as to matter of law cannot be relieved against in equity.

Snell *v.* Ins. Co., 98 U. S., pp. 90–91.

In Lansdown *v.* Lansdown, Mosely, 364, the right of the heir-at-law was contested by a younger member of the family, and the arbitrator to whom the subject was referred decided against him. He executed a deed in compliance with this award and was afterwards relieved against it, on the principle that he WAS IGNORANT OF HIS TITLE. The case does not suppose this fact, that he was

the eldest son, to have been unknown to him; and, if he was ignorant of anything, it was of the LAW, which gave him, as eldest son, the estate he had conveyed to a younger brother.

Yet he was relieved in Chancery against this conveyance.

THE CASE AT BAR IS STRONGER.

There was positive fraud and other inequitable, unfair and deceptive conduct which tended to confirm the mistake and conceal the truth on one side, coupled with mistake in law on the other.

In such cases equity affords relief, notwithstanding, or indeed, because of the mistake in LAW.

In *Haviland* v. *Willets*, 141 N. Y., 35, pp. 45, 48 to 51,
(Citing *Lansdown* v. *Lansdown*, *supra*; 2 J. & W. 205, 6 Cl. & Fin. 966.)

the Court of Appeals, after stating the rule which prevents relief in equity from a mistake of law, holds that the rule is subject to an exception, that there must have been no improper conduct on the other side, and says (pp. 50–51.): "Much more should the rule we have asserted apply in a case where the release is utterly without consideration and where its true legal effect is simply an authority * * to give away the former's property through ignorance of his ownership."

In Murray v. Palmer, 2 Sch. and Lef., 474, a conveyance obtained from a woman in ignorance of her rights and upon misrepresentation of the circumstances of the property, was set aside; although she was of full age and acquiesced in the sale and received the interest of the purchase

money for twelve years, and although she consulted with her friends and had their assent, they being in equal ignorance with herself.

VII.

Assignments against the proceedings whereby complainants were deprived of disclosure of the contents of the fourth codicil, executed November 11th, 1890, destroyed by Vaughan.

While this suit in equity was depending in the Circuit Court, testimony was being duly taken on the part of the complainants under the 67th Equity Rule. A witness, Prescott Hall Butler, was interrogated concerning the contents of a testamentary paper, affecting the disposition of the estate, which complainants were there seeking to establish as valid, which paper had been illegally destroyed. Mr. Butler was the attorney who drew and supervised the execution and publication of the paper upon the employment of the decedent. He refused to answer upon the ground of the privilege of his client, claiming that thereby he was forbidden to disclose the contents of the destroyed codicil.

The Circuit Court overruled his objection and directed him to answer. He refused. The Court adjudged him in contempt and directed that he be committed until he should purge the contempt by making answer.

This was a purely remedial interlocutory proceeding. No fine was inflicted. The order was

not in any sense a final judgment in a criminal case. The decision in

Bessette v. *W. B. Conkey Co.*, *194 U. S.*, *324*,

affords no support for the review of the order by writ of error.

Then the witness sued out a writ of error from the Circuit Court of Appeals, to review the propriety of the decision of the Circuit Court that the witness answer the question. These complainants being therein made defendants in error, moved the Circuit Court of Appeals to dismiss the writ of error upon the ground that the decision of this Court in the Debs case (158 U. S., pp. 596, 599; 159 U. S., p. 251) was a controlling authority that there was no jurisdiction to review such an order by writ of error. The motion was denied. The Circuit Court of Appeals proceeded to assert jurisdiction, and reviewed the propriety of the ruling in the principal cause, holding that it was erroneous. The Circuit Court of Appeals entered an order reversing that ruling and sustaining the contention of the witness.

The bill of exceptions in the Circuit Court of Appeals showed that the evidence before the Circuit Court was conflicting, as to the existence of the privilege, and that the preponderance of evidence, then adduced, sustained the conclusion that the asserted, professional confidence had no existence in fact. (See Vol. II, pp. 661 to 713.)

The theory of the decision is that the order committing Mr. Butler is a "final judgment in a criminal case." If such, it is one which is reviewable by *certiorari* under Section 6 of the Judiciary Act of 1891.

Hubbard *vs.* Tod, 171 U. S., 474, 494.

If not such, then the Circuit Court of Appeals interposed to end the principal suit, by asserting a power which it did not possess. If it had done that, the order was reviewable by *certiorari* in the exercise of the general supervisory powers of the Supreme Court of the United States.

In re Chetwood, 165 U. S., p. 462.

Complainants applied for *certiorari* to this Court to apply the same principles to Mr. Butler, which were by this Court applied to Eugene V. Debs. This Court said in *Ex parte* Debs, 158 U. S., pp. 596, 599:

"A Court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it had adjudged them entitled to."

The basis on this occasion for the jurisdiction of the Circuit Court of Appeals was the same which, at the time of the Debs' case, this Court had, to review final judgments in criminal cases.

But this Court in the Debs' case dismissed the writ of error for the reason just quoted.

Our application for *certiorari* was denied without opinion.

175 U. S., 725.

It is understood that such denial was on the ground that the decision was interlocutory and should be reviewed upon the main appeal in this cause.

We have thus fallen between two stools. We have been aggrieved by a decision of the Circuit

Court of Appeals, which, against our contention, was entertained as an independent suit by writ of error, and a final judgment made therein which terminated that suit, and this Court has declined to treat it as an independent suit.

It must, therefore, be reviewable now and here. Since the Circuit Court treated it as valid and reversed its own decision upon our right to Mr. Butler's disclosure of the contents of the destroyed codicil, we ought to have the ruling reinstated, if the Circuit Court of Appeals acted, in reversing that ruling without authority. Especially as the ruling of Judge Lacombe was undoubtedly right, and that of the Circuit Court of Appeals wrong.

The supposed support for the writ consisted of two decisions of the Circuit Court of Appeals, which we contend had no such, possible application.

These are

Gould *v.* Sessions, 35 U. S. App., 281.
White *v.* Toledo, St. Louis, &c., R., 51 U. S. App., 54.

In Gould *v.* Sessions, the Court entertained a writ of error to review the question whether, in fact, the plaintiff in error had been guilty, being *defendant* in an equity suit, of a contempt of an injunction order, and while assuming collaterally, that the injunction order was properly made, the Court held that the determination that it had been violated was not sustained by sufficient evidence.

The contempt proceedings were in that case before a Judge other than him who granted the injunction order; they resulted in a punitive fine, payable to the United States, and a commitment until it should be paid. The original suit was at an end.

In the case of Fayerweather the Judge had vindicated the authority of the Court, following an undisputed contumacy, still persisted in, in the face of the Court; and had vindicated it by a purely coercive order. That class of cases the Circuit Court of Appeals found it necessary to distinguish in Gould *v.* Sessions, in commenting upon Worden *v.* Searles. It pointed out that the fine was there by way of indemnity to the party injured. Here the authority is exercised merely to coerce the witness so he will not obstruct the administration of justice. There is no fine. The commitment was wholly by way of remedy to effectuate the civil rights and remedies of the complainants. If that were not within the purely discretionary powers of the Circuit Court and not subject to review in any other Court, then is the whole doctrine of the law of contempt at last subverted, and that too, in a case where the remedies of these parties in the State Courts have previously been disregarded to an extent to deprive them of "due process of law." It was never before held that a contumacious person could be heard, collaterally, to appeal from the mandate of a Court upon allegations of mere error.

In the case of White, the Circuit Court of Appeals dealt with the jurisdiction of the Circuit Court of the United States in our district to afford ancillary aid to the jurisdiction of another Circuit Court in another district, by the coercion of a witness to depose in the principal suit, he being here and out of that jurisdiction. The practice, as well as the jurisdiction, was there assumed without discussion. There was no principal cause depending in the courts of this district.

Consider where the contention sustained in

the Circuit Court of Appeals leads. The suit in equity must be got rid of. Otherwise no review can be had but by appeal from the final decree. If it is got rid of, it is by the fiction of treating the authority, really exerted in the cause, as an independent authority, exerted to inflict punishment for a breach of the criminal laws of the United States and resulting in a *final judgment*, reviewable, as such, by writ of error.

But, upon this very assumption, it follows that the Circuit Court of Appeals is asked to review, *collaterally, for error*, the propriety of the determination of a question of mixed law and fact, in another cause.

The privilege of the relation of lawyer and client is not an absolute, constitutional right which can, upon no state of facts, be departed from. On the contrary, although the STATUTE which *creates* the privilege contains no exceptions, the Courts have repeatedly construed it so as to sustain the spirit and meet the mischief of the statute.

In the case of

People *v.* Carlyle Harris, 136 N. Y., p. 448,

the Court was asked to apply its literal language to prevent a physician who had attended a woman, for the murder of whom the defendant was indicted, from testifying to her condition, which he learned in his professional capacity, as tending to show that she died of poison. The Court refused to make that monstrous misapplication of the statute.

There is no limitation of the statute in words, in the case of a lawyer, which will not screen the criminal who lawlessly destroys a will from the

efforts of the law, to thwart his crime or punish him or to establish the will. But is it not a question of fact in each case whether the asserted privilege will defeat instead of conserving the desire of the decedent?

If it be a question of mixed law and fact, upon what principle can it be reviewed collaterally?

In re Swan, 150 U. S., pp. 651, 652.

The supposed grounds for treating such cases as reviewable by writ of error because they were "final judgments in criminal cases" have been, by the Supreme Court of the United States, utterly denied in *Ex parte* Debs, 158 U. S., pp. 596, 599, where the Court says:

"In brief, a Court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it had adjudged them entitled to."

The idea originated in a *dictum* in

Ex parte Kearney,

now set at rest in the Debs case.

The same Circuit Court of Appeals, shortly after, sustained the contention of complainants and declined the jurisdiction, citing the Debs case as controlling in

Nassau Electric Co. *v.* Sprague &c., Co., 95 Fed. Rep., 415.

Its decision was, like others, peculiar to the Fayerweather case, and not applied to other cases.

It is one of a series of decisions where the equal protection of the law has been denied us not only in the state courts but in the federal courts.

It is one of the many obstructions which these suitors have encountered which seems based upon the determination to hold the legacies to these numerous colleges, notwithstanding the statute of wills and the general rules of law.

Jeremy Hooker, in his eulogium of the law, its power, its universality ought to have made an exception in favor of such institutions of learning as fostered his genius. The demands of the college upon her powerful sons ought to have been exalted. Judges upon the bench, passing upon the claims of *alma mater*, ought to have been excepted from too rigid an adherence to rules which come *per antiquas vias*.

The Fayerweather litigation encounters in various quarters remarkable hostility and prejudice. It may be that it ought to be defeated, according to those rules and forms which have been established for the protection of private rights. But something more than this suit will be annihilated and cast down if this, the latest of the unexampled departures from law in its regular course of administration through courts of justice, shall now be approved. Some better reason than any which appears should be assigned why the rule applied to Debs is not to be applied to Butler.

The contention of complainants is that no jurisdiction existed in the Circuit Court of Appeals to entertain a writ of error to review said question or commitment, and that the decision, if the Court had jurisdiction, was erroneous.

The Circuit Court of Appeals in the Fifth Circuit has held that no jurisdiction exists in that Court to review contempt proceedings.

King *vs.* Wooten, 2 U. S. App., 651.

In harmony with the decision in the Debs case, this Court issued a writ of *certiorari* in the Chetwood case (165 U. S., p. 462) to review a contempt; while the existence of the remedy by writ of error out of the Circuit Court of Appeals would have led to the denial of the *certiorari*, under the rule announced in

In re Tampa R. Co., 168 U. S., p. 588.

There are particular grounds of error in the decision of that court.

By the order of the Circuit Court of Appeals the absurd result is reached that an interlocutory ruling in one Court is reviewed collaterally in another, upon the pretended record of a factitious judgment. This judgment is reviewed upon the pretended ground that the plaintiff in error has been illegally adjudged guilty of violating a judicial mandate.

The decision is that upon a record of *mixed law and fact*, mere error was committed in the collateral and original ruling.

But no procedure *known to the law* will make the reversal of the interlocutory ruling, effectual in the place where it was made. The commitment is, indeed, vacated; but no *authorized* review has resulted in the correction of error in the principal suit. There is a mere act of force. The procedure is anomalous and everywhere conflicts with established principles.

Following is Judge Lacombe's opinion upon our right to the disclosure sought:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FAYERWEATHER, *et al.*

vs.

RITCH, *et al.*

Application to compel a witness to answer questions certified by the Examiner, sitting to take testimony in equity. One of the issues upon which complainant is seeking to put in proof, is as to the destruction of a document executed by a deceased testator and known as "the fourth codicil", and complainant is seeking to show the contents of such codicil, which she contends was duly executed by testator in the presence of subscribing witnesses. The witness under examination is the counsel of deceased who took his instructions for the preparation of the codicil, drew it up, delivered it to the testator, and apparently saw him execute it. Presumably he is able to testify what were the contents of the document (since destroyed), and, so far as appears, no other witness is able to do so. The witness declines to testify to the contents of the document, contending that his lips are sealed as to communications with his client, both by well recognized principles of jurisprudence, and by the statute of the State of New York.

LACOMBE, Circuit Judge:

It is a sound public policy which provides that an attorney or counsel should not be allowed to testify

to any of the transactions or conversations between himself and his client which led up to the preparation of any document. But when the document, be it a will or a contract, or what not, has been executed, its contents are no longer confidential, the reason for the rule ceases, and the counsel may as properly testify to the contents as may any other witnesses who know such contents.

The statute of the State of New York provides (Code of Civil Procedure, Sec. 835) that: "An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment."

At the time the cause hereinafter referred to was before the Courts, the next Section 836, provided that: "Sec. 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client." While the statute stood thus the case of *In re Coleman* came before the Court of Appeals, 111 N. Y., 220. Counsel who prepared the will of deceased under instructions from him, and had subsequently, at his request, signed the attestation clause, as witnesses, were allowed to testify to the circuustances attending its execution, including the condition of his mental faculties at that time. This was upon the theory that the request to witness his will was a waiver of the privilege which the statute conferred. The language of the Court was broad enough to warrant the finding of a like waiver as to the mere contents of the document, in the execution of the instrument by deceased. "It would", says the Court, "be contrary to settled rules of law to ascribe to the testator an intention, while making his

will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statue which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action." And certainly the whole object of a testator's action would be destroyed if, his executed will being by some accident destroyed, the only witness who could testify to its contents was forbidden to testify thereto. Since the Coleman case the statute (Sec. 836) has been amended so that it now reads:

"Sec. 836. The last three sections apply to any examination of a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate, or hereafter to be executed or offered for probate, from becoming a witness as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto." But even in their present form the two sections (835 and 836) taken together seem not to be applicable to the cause at bar, provided the testimony sought to be elicited from counsel is strictly confined to a statement of the contents of a document which ceased to be confidential when it was executed. The execution of the document, however, does not make the transactions and conversations between counsel and client which led up to its execution any the less confidential, and as to such transactions and conversations there is no express or even any implied waiver. The privilege covers also all conversations and transactions with the client's agent or intermediary.

The witness, therefore, should answer, if he knows, as to whether or not a paper prepared by himself as counsel was, in fact, signed by deceased in the presence of attesting witnesses in the form and manner required to constitute a valid publication of such paper as a testamentary document; and, if he knows, or as far as he knows, he should state the contents of such published document, if he testify that the document was in fact thus published. The objections to all other questions inquiring as to conversations and transactions with his client or his client's agent leading up to the preparation and execution of such document are sustained. The case of Glover *v.* Patten, 165 U. S., 394, has not been overlooked, but it does not seem to be controlling to a contrary decision.

October 22, 1898.

Following is Judge Wallace's opinion for reversal:

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

BUTLER,
Plaintiff in Error,

vs.

FAYERWEATHER *et al.*
Defendants in Error.

WALLACE, Circuit Judge:

This is a writ of error to review an order committing the plaintiff in error for contempt in default of answering certain questions propounded to him as a witness in an equity cause pending in the Court in which the order was made. The witness was not a party to the cause and based his refusal to answer the questions upon the ground of privilege, he being an attorney and asserting the questions to call for professional communications of his client

It is insisted for the defendant in error that the order cannot be reviewed upon a writ of error, but only upon appeal from a final decree in the cause in which it was made. This Court in Gould *vs.* Sessions (35 U. S. Ap., 281), held a contempt of court to be a criminal offense, and an order imposing a fine therefor to be a judgment reviewable by a writ of error at the instance of the party aggrived. It was determined in Crosby's case (3

Wilson, 188), and declared by the Supreme Court in *Ex parte* Kearney (7 Wheat, 38), that an adjudication for a contempt was a conviction, and a commitment in consequence an execution. In New Orleans *vs.* Steamship Company (20 Wall., 392), the Supreme Court said: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing." *In re* Debs (158 U. S., 564), the defendants in an equity cause were committed for contempt for the violation of a preliminary injunction restraining them from committing the acts to enjoin which the suit was brought, and upon an application to the Supreme Court for a writ of error, the writ was denied upon the ground that the order of committal was not a final judgment or decree. That was a case in which the propriety of the order could have been reconsidered by the Court which made it at final decree, and being an interlocutory order in the progress of the cause, could only be reviewed by the Supreme Court upon an appeal from the final decree. The case is quite different, however, when a person not a party to the cause is imprisoned or fined for contempt. The order proceeds upon a matter distinct from the general subject in the litigation. The aggrieved party has no opportunity to be heard when the cause is before the Court at final hearing, and as to him the proceeding is finally determined when the order is made. Not being a party to the cause, he could not be heard on an appeal from a final decree, and unless he can be heard by a writ of error he has no review, but must submit to the determination of the

Court below, if the Court has jurisdiction, however unwarranted it might be by the facts or the law of the case. It would be a reproach to the administration of justice if the statutes of the United States, conferring appellate jurisdiction upon this Court to review all final decisions of the Circuit Court, failed to provide any means of review to the citizen who has been deprived of his liberty or required to pay a fine without just cause. We think the power conferred extends to a case like the present.

Whenever in a cause there is a determination of some question of right, a decision is final in the sense in which an appeal from it is permitted if it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the further judgment of the Court, so that to bring the cause again before the Court for decision will not be necessary. Mackey *vs.* Mallory, decided by this Court, February 23rd, 1897; Rouse *vs.* Hornsby (14 C. C. A., 377); Gumbel *vs.* Fitkin (113 U. S., 545); Trust Company *vs.* Grant Locomotive Works (135 U. S., 207).

Upon its merits the appeal presents the question whether an attorney who has prepared a codicil to a will alleged to have been executed and published by the testator, his client, and fraudulently destroyed by one of the executors named in a subsequent codicil can be required to disclose its contents and whether it was signed by the testator in the presence of attesting witnesses in form and manner to constitute a valid publication, the attorney being present at the time of the alleged publication, but not being an attesting witness. Irrespective of the effect of the statute of this State

the question would be free from doubt. The rule of evidence which forbids an attorney, without the consent of his client, to disclose communications made to him professionally by the client applies generally to the contents of documents intrusted to him unless he is a subscribing witness, whether the documents are evidence of title, formal instruments, or merely letters or memoranda (2 Taylor, Evidence, Sections 911-936). If he has attested an instrument for his client the professional relation is thereby abandoned *pro hac vice*, and he may be compelled not only to prove its execution but all that passed at the time. An exception to the general rule exists in the case of testamentary dispositions (1 Wharton, Evidence, 591), upon the principle that the disclosure can affect no right or interest of the client. In Blackburn *vs.* Crawfords (3 Wall., 175), it was held that an attorney who drew a will could testify as to statements made by the testator about the legitimacy of his children and his relations to their mother, made in interviews between him and the attorney preceding and connected with the preparation of the will. In Glover *vs.* Patten (165 U. S., 394), it was held in a suit between devisees under a will that statements made by the testator to counsel respecting the execution of the will, or of similar documents, were not privileged.

By Section 858 of the Revised Statutes of the United States the laws of the State in which the Court is held are the rules of decision for the Courts of the United States as to the competency of witnesses in equity causes as well as in trials at common law; and as construed by the Supreme Court in its latest utterances upon the subject, this provision supplies the criterion of the competency

of evidence as well as the competency of witnesses Connecticut Life Insurance Co. *vs.* Union Trust Co. (112 U. S. App., 250-255); Mutual Benefit Life Insurance Co. *vs.* Robinson (19 U. S. Ap., 266). In this State the common law rules of evidence in respect to privileged communications have been materially changed by the Code of Civil Procedure (Sections 835-836). Whether these changes were inconsiderate, and due to hasty and superficial legislation, or whether they were made with a deliberate purpose to seal the lips of witnesses in cases where the Courts had refused to do so, it is unnecessary to inquire. The statute must be given the effect which its language requires. Originally the Code merely provided that an attorney or counselor at law should not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment unless that provision should be "expressly waived" by the client. The statute came before the Court of Appeals of New York for construction in two cases decided in 1888; in matter of Coleman (111 N. Y., 220) and Loder *vs.* Whelpley (111 N. Y., 239). In both of these cases it was held that the prohibition of the Code precluded the disclosure of instructions given by a testator to an attorney employed to draw his will; but in Coleman's case it was held that where the attorney became the attesting witness to the will at the request of the testator, the prohibition was "expressly waived" within the meaning of the Code, and the attorney was competent to testify as to all the circumstances attending the execution of the instrument. Thereafter the Code was amended so that the prohibition should apply unless "expressly waived upon the trial" by the

client, but should not disqualify an attorney "in the probate of a will" from becoming a witness "as to its preparation and execution" if one of the subscribing witnesses thereto. As the statute now reads no act of the client, except a waiver upon the trial, can be treated as a waiver of the prohibition of disclosure, and except he is an attesting witness to a will in no case is an attorney permitted to make disclosure in respect to the contents of any documents or other information communicated to him in the course of his professional employment by the client. It follows that the plaintiff in error properly declined to disclose the contents of the codicil or testify to the declarations of the testator attending its execution.

The circumstance that other witnesses were present at the time when the codicil is alleged to have been executed and published, even though they heard all that took place, and were aware of the contents of the instrument, is wholly immaterial. Under such circumstances the other witnesses are permitted to testify to the communications which pass between client and attorney. Jackson *vs.* French (3 Wend., 337); Hoy *vs.* Morris (13 Gray, 519); People *vs.* Buchanan (141 N. Y., 1). Nor does the circumstance that the complainants may be able to prove that the codicil was fraudulently destroyed by one of the persons who was appointed an executor of the will by a subsequent codicil deflect the operation of the rule against disclosure by the attorney. Probably the statute is not to be construed as intended to apply to cases of fraud contrived by the client and solicitor in concert, or to communications between them made in the course of a criminal scheme. Before the statute the privilege did not apply to all communications between

client and attorney, but only to such as passed between them in professional confidence; and the courts generally repudiated the proposition that the contriving of a fraud or the conniving in a crime could form part of the professional occupation of an attorney or counsel. There is no pretense in this case that the codicil or anything which took place at the time of its alleged publication was of a fraudulent or criminal nature.

We conclude that the order of the Court below was an erroneous exercise of power, and it is therefore reversed."

The question of Mr. Butler's privilege was not a new one, and if the Circuit Court of Appeals had respected the mandate of Section 858 of the U. S. Revised Statutes, and had followed the decision of the State Court upon the construction of the State statute, it would not have reversed Judge Lacombe.

Because the same question came up in the Surrogate's Court upon the contest (Surrogate's Record, pp. 786 to 789), filed, but not printed under the stipulation and order in Vol. II, p. 950; Vol. III, pp. 4, 5; Vol. IV, pp. 618, 640, 641. The most vigorous resistance was made by the defendants here to the disclosure of the contents of the codicil of Nov. 11, 1890. They paid Mr. Choate, a partner of Mr. Butler, $5,000, out of the moneys of the State to oppose the disclosure (Vol. I, p. 504). When the Surrogate overruled the objection of privilege and required Mr. Butler to answer, the settlement which we assail was made, and the decree for probate followed.

Mr. Butler is dead. That, however, does not render the question an abstract one. Not only has the error practical consequences as pervading a de-

cree under review; but there are drafts of the codicil possibly in the possession of defendants or of Mr. Butler's associates (Vol. IV, pp. 587, 588; Vol. II, p. 551, 552, 553; Vol. I, pp. 678 to 680) subject to the same principle.

The decision of Judge Wallace is made to rest upon an amendment to Sec. 836 of the N. Y. Code of Civil Procedure, enacted 1899, to take effect September 1st, 1899, so as to require, what the authorities previously did not require, that a waiver must be by the client at the trial; but that a stipulation by the attorneys for the respective parties prior to the trial should be sufficient.

Judge Lacombe considered this provision, and held that it did not apply here; that the settled rules on the subject of such waiver were not changed thereby.

It is difficult to see why the reason set forth by this Court in the case of

Glover *v.* Patten, 165 U. S., p. 408,

does not apply to all questions of waiver or why any different rule should apply in New York. Certainly, no State authority controlling under Sec. 858, U. S. Rev. Statutes, required the construction of the added provisions for waiver to this case, given to the addition by Judge Wallace, who, resorting to principle, would have had the aid of the opinion of this Court:

BROWN, J.—"The client may waive the protection of the rule. The waiver may be expressed or implied. We think it as effectual here by implication as the most explicit language could have made it. It could have been no clearer if the client had expressly enjoined it upon the attorney to give this testimony whenever the truth of his testamentary

declaration should be challenged by any of those to whom it related. A different result would involve a perversion of the rule, inconsistent with its objects and in direct conflict with the reason upon which it is founded."

See the authorities cited in *Glover* v. *Patten*.

There is a further consideration which requires that the amendment to Sec. 836 of the Code should not be applied to this case. Mr. Fayerweather had in his lifetime done what, by the authorities then settling the true construction of the privileges of the Code, was effectual to constitute Mr. Butler a competent witness to the matters inquired of. Judge WALLACE says: "Irrespective of the effect of the statute of this State the question would be free from doubt". Then he goes on to assert the binding force of the Code, by operation of the Revised Statutes assimilating the rules of evidence. Well, then, if the amendment of 1899, be given a retroactive effect the absurd result follows that the wish of the client, effectually expressed in his lifetime, is annulled by requiring the consent of parties to a lawsuit or a stipulation of their attorneys made before the trial. It may be, and in this case it has been, required that the very persons against whom the disclosure is sought, are those whose consent to the disclosure must be obtained. Such a result must be avoided by every possible means and, if the statute means that, then it must be condemned as something more than a practice act. It takes from the parties to a contract arising by the operation of the statute of wills accepted by the testator, acted upon and which then effectuated his lawful

directions, the means of enforcing its obligations, and thereby it impairs such obligations in violation of the federal constitution.

Fisk *v.* Jefferson, 116 U. S., p. 134.
Railroad Co. *v.* Tennessee, 101 U. S., p. 340.
New Jersey *v.* Yard, 95 U. S., p. 114.

The importance of the disclosure cannot be too strongly stated. The evidence, incomplete as it is, yet shows that by that codicil Mr. Fayerweather abandoned his plan, invented by Mr. Ritch, to circumvent the statute of 1860, and returned to the original will, abandoning the secret trust and making other provisions to satisfy those who could set up the violation of the statute. There pervades this question then, this consideration, that as a deliberate act of Mr. Fayerweather, the execution of the dying day codicil is incredible. But as the act of Ritch and Vaughan, it clamors of their selfish interests and motives. Vaughan says (Vol. IV, p. 587): "The substance of the codicil was to revoke * * * the bequest of the residue of the estate to Mr. Bulkley and Mr. Ritch; in substance, to restore the tenth paragraph of the will" (p. 596): "It took the residuary estate from Mr. Bulkley and Mr. Ritch; * * * and my recollection is, that it restored it to the *status* in which it was before it was conveyed to them; before it was willed to them." That is most significant. If it shall hereafter transpire that Bulkley and Ritch were entirely eliminated as executors and as residuary legatees, there will be no perjury in this statement. But what radical consequences, in respect of the construction of the series of papers constituting the will, as adjudged

in the Five College action, will follow from the establishment of the Butler codicil and the annulment of this monstrous, dying day codicil! The codicil of November 11th was executed in consequence of the utter loss of confidence in Ritch, brought about by Vaughan. It is inconceivable, under the circumstances shown in that connection that Mr. Fayerweather retained Ritch as an executor or that any title which goes through Ritch, can be valid. Regarding the case made against the dying day codicil as an entirely fictitious or unconscious act, the codicil of November 11th expunges the basis of the Five College judgment, as an adjudication of anything here. It then becomes a moot case for the construction of a will which has no existence. A new case is then presented.

So that, whether as an attack upon the probate, or as evidence of the untruth of the pleas, it is essential to consider the circumstances attending the execution of the destroyed codicil, attending its destruction and the efforts to reinstate Ritch as executor and to revive the legacy of the residuary estate to him and Vaughan by the dying day codicil. Bulkley had nothing to do with it, except the passive part which he has occupied throughout.

These are the proofs upon the subject.

Prior to November 10th, 1890, so far as the will and codicils went, this situation existed: Messrs. Ritch and Bulkley, without Bulkley's knowledge, were, in their own right, residuary legatees of about three millions of dollars with a possible three millions more, *in their discretion.* But there were certain private writings in existence putting a different light upon the otherwise inexplicable devise.

These writings all went one way, from Mr. Fayerweather to Mr. Ritch, they were all in Mr. Ritch's possession, and they were all utterly unknown to Mr. Bulkley and Mr. Vaughan down to that day, a period of six years. The devise was unknown to any of the beneficiaries except Mr. Ritch. In the case of Vaughan, until that day, and in the case of Mr. Bulkley, until after Mr. Fayerweather's death. These writings were, first, a letter on the letter head of Arnoux, Ritch & Woodford, dated October 6th, 1884, wherein Mr. Fayerweather states that he has executed his will of that date, having been advised by his counsel of the provisions and restrictions of the law of this State relevant to benevolent corporations. He adds, "I trust my heirs will permit the provisions of this my will to be carried into effect". The second writing was a memorandum dated December 11th, 1884, in which Mr. Fayerweather states that he has made Bulkley and Ritch the residuary legatees in the confidence that thereby his intentions *as expressed in his will*, shall be carried into effect and without litigation on the part of any person or persons interested. In case of his death he trusts they will take such steps by law or otherwise as will protect his estate against the contingency of the death of either, until it is settled and distributed. The third paper is a "private memorandum" (Exhibit 20), dated March 22d, 1889 (Vol. IV, p. 220), expressing his "judgment" that certain bequests be withheld, saying that he "thinks" that the bequest to Cornell should not exceed one hundred thousand dollars, "recommends" a gift to the Northwestern University, "suggests" that certain other legacies be paid, and "wishes" that a thousand dollars be given Miss

Joyce immediately after his decease. *There was not a scrap of paper by way of a declaration of trust from Ritch.* Consider for a moment Ritch's situation at this point. The legacies to the twenty institutions rested in his "discretion"; the payment of the legacy to Mrs. Fayerweather rested in his "discretion"; he might hold up to Miss Joyce, to prevent her from having the protection of a husband, the condition as to her annuity "while she remained unmarried". Mr. Ritch, then, could, by the exercise of "discretion", have thrown the legacies into the residuary estate and, by suppressing private memoranda in his possession, have succeeded to the entire estate of six millions of dollars. The trust dependent upon such discretion was probably not enforceable,

In this record (Vol. II, pp. 546 to 549), testimony of A. A. Joyce:

About a week before Mr. Fayerweather's death Mr. Vaughan came to the house to read to Mr. Fayerweather his will, and after reading it there was a great discussion between Mr. Fayerweather and Mr. Vaughan relating to the contents of the will (p. 587). * * * She had previously written to Mr. Ritch to bring the will to the house, and it was in an envelope in Mr. Fayerweather's pocket, hanging on the rack in his room. A part of the time she was present at the discussion between Mr. Fayerweather and Mr. Vaughan after the reading of the will. She was in an adjoining room and heard a great excitement between Mr. Fayerweather and Mr. Vaughan. Mr. Vaughan was trying to make Mr. Fayerweather understand the contents of his will, which he could not bring to mind—could not make up his mind was so. And Mr. Vaughan said to him—this I heard distinctly

as I came into the room: "If you were to die today those two executors would get more than half your fortune."

And they had quite an argument about it and some very large, strong talk.

Mr. Vaughan said: "This man Ritch has written this and he and Mr. Bulkley will come into possession of half your property, and I say this man, this Ritch, is a damned scoundrel." Fayerweather thought that Mr. Vaughan was mistaken, that it could not be possible.

He said this is not the original will. I want to see the original will and see if those statements are correct.

(P. 553.) After this interview, Mr. Fayerweather said he had found something in his will which reflected very much upon Mr. Ritch's integrity. Previous to this when he had asked to see his will, she had objected—thinking it would disturb him—to his having anything to do with his will, because she supposed it was all right. He said, "I have heard lately of Mr. Ritch doing crooked things, and I do not want to find a mare's nest in my will."

Immediately after this he said to her, "I have found the mare's nest."

When she asked him why he employed Mr. Ritch, he said because he had been Mr. Hoyt's lawyer, and they recommended him to him; and he had done some business for other gentlemen, and also for Mr. Vaughan, and that he had made a serious blunder, and he wanted to see if his will was all right."

The letter of Ritch to Miss Joyce wherein he offers to do anything desired and deplores the loss of Mr. Fayerweather's confidence (Vol. IV, p. 224)

was seen by Mr. Fayerweather, who directed her to turn it over to Vaughan. Mr. Fayerweather commented on it. He said (Vol. II, p. 558), "Poor Ritch, he has gotten into trouble, but I will not see him."

Mr. Fayerweather had said to her, repeatedly, prior to that time, from the time of reading that will, "If that man comes here, don't let him up stairs. The sight of him would kill me." And she quieted him, saying, "You shall not see him."

The record shows that the State Court *excluded evidence* that Vaughan, when this situation was disclosed to him, characterized Ritch as "a damned scoundrel" (Vol. II, p. 548). This all shows that Vaughan then believed, and convinced Mr. Fayerweather, that Ritch had created the situation with the design of personally profiting by it; that to leave the residuary clause in the codicil would not secure what Mr. Fayerweather intended; **that it was essential to get the will and codicils out of Ritch's hands and to secure from him some declaration of trust; that a new codicil should be made depriving Ritch of the power which they believed he meant to abuse,** and that Mr. Fayerweather should not see him again. He never did see him again. Ritch did not come with the dying-day codicil. He sent some clerks, undistinguishable then, however distinguished since. The shock caused Mr. Fayerweather by these circumstances shortened his life. The attending physician expected him to live until March. The conditions produced by the proceedings of November 10th, pointed so rapidly and so seriously to dissolution that what next took

place occurred with the greatest haste and hurry. From what they did in that haste and hurry, as we will presently point out, the Court will be able to judge WHETHER THEY WERE ENDEAVORING TO SECURE MR. FAYERWEATHER'S TESTAMENTARY DESIRES OR THEIR OWN ENDS. Mr. Fayerweather died five days after this interview with Vaughan. Meantime he followed blindly whatever Vaughan directed. He signed letters to Ritch written by Vaughan without reading them (Vol. IV, p. 223; V, 489), and Vaughan did not think it necessary to communicate Ritch's answers to him (Vol. V, p. 490). On the 11th of November he executed a codicil prepared by Prescott Hall Butler at Vaughan's suggestion (Vol. VI, p. 669), which Vaughan remembers as changing this residuary clause and restoring the tenth clause of the will (Vol. VI, p. 669). Under the circumstances it is impossible to believe that Mr. Fayerweather, by the fourth codicil of November 11th, left Mr. Ritch as an executor; left the legal title in the man who had so shocked his confidence; left to the man who, he believed, meant to abuse his power, the "discretion" to throw all his legacies away from the twenty institutions into the residuary estate; meant to leave the annuity and the livelihood of his wife and her sister to his "discretion". The opinions and apprehensions created by Vaughan in the mind of Mr. Fayerweather against Mr. Ritch, as disclosed by this record, would never have comported with leaving Ritch in any such position. There is every reason, therefore, to believe that **this codicil,** destroyed without warrant, and **subject to be reinstated upon disclosure of its contents and constituting the last authentic,**

testamentary act of Mr. Fayerweather, placed the legal title in other executors.

The contents of that codicil are known to some of these appellees, who are silent on the subject. They are probably known to all who have so actively opposed their disclosure.

Now come to the last codicil of November 15th, claimed to have been executed a few hours before Mr. Fayerweather's death. Since the Act of 1848 it has been the policy of this State not to permit testamentary acts of this character, the giving away of money to institutions of this kind, to be done unless it shall be done two months before the testator dies, and that it shall not be done while he is *in extremis*, in the throes of dissolution (Fairchild *vs.* Edson, 154 N. Y., pp. 199, 214-215). The circumstances of the making of that codicil are as follows: Vaughan went on the 13th of November with the codicil of November 11th in his pocket, for as soon as it was executed it was handed over to him and he had it until he destroyed it (Surrogate's Record, Vol. vi, p. 668), to call upon Mr. Ritch. He also took with him two letters written at one and the same time by himself to Mr. Ritch and signed by Mr. Fayerweather. He did not disclose to Ritch the making of the codicil of November 11th and Ritch did not know of it until after Mr. Fayerweather died. Ritch says so (Vol. vi, p. 810). Vaughan says so (Vol. v, p. 507; Vol. vi, p. 683). They are circumstantially corroborated, because if Mr. Woodford, when he drew the codicil of November 15th under Mr. Ritch's and Mr. Vaughan's directions (Vol. v, p. 901), had known of this codicil of November 11th, he would have put a revocation clause in that

codicil of November 15th, and he would not have contented himself, as he did (Vol. iv, p. 122), with the recital that Mr. Fayerweather having made his will of 1884 and his codicil first, second and third of such a date, he now reaffirmed them and added that codicil. That is circumstantial evidence, conclusive to a lawyer, that Mr. Vaughan did not disclose to Mr. Ritch the making of the codicil of November 11th. But Vaughan *did deliver* one of the two letters (Vol. iv, p. 222), in which he makes Mr. Fayerweather ask Ritch to deliver to Mr. Henry B. Vaughan his original will, with the first, second and third codicils. Mr. Ritch at first demurred, saying, "I will take them myself to Mr. Fayerweather". But Vaughan points out to him that he is to deliver them to VAUGHAN, and he complies. Vaughan thereupon writes Miss Joyce, who was the general director of the household and Mr. Fayerweather's amanuensis (Vol. iv, p. 222): "Will you please explain to Mr. Fayerweather that I have obtained the letters from Ritch? At first Mr. Ritch stated that he would take the papers to Mr. Fayerweather, but I reminded him that the letter read to give them to me, and he said he would do it. *He grew, however, as white as the paper upon which I am writing. I will deliver the second letter to-morrow; there is, however, but little use in this, and I am convinced from his manner that Mr. Ritch knew exactly what he was doing.*" When Mr. Vaughan afterwards cast in his lot with Mr. Ritch, when they were both asserting this residuary clause to be absolute, and that it gave them this entire residuary estate; then he tried to explain, as a witness, that Mr. Ritch grew white because he was angry with his manner and not because he had been detected and

exposed in a fraud. But Ritch, in point of fact, took alarm and tried to get access to Mr. Fayerweather through Miss Joyce and his volunteered offer, then, to make a declaration of trust, showed that he had somehow come to the conclusion that, as the legal advisor of this man, he was open to criticism in not having done, or said, or written something, by which the secret trust could be enforced, and so he wrote Miss Joyce as follows:

> "I have had two long talks with Mr. Vaughan, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says Mr. Fayerweather is too ill to be seen, and so I would be glad to have you say to him, if you think it well, that I will execute any papers, or say anything in your presence, or in that of any one else, that will enable him to feel his wishes will be carried out to the letter."

Mr. Ritch knew perfectly well what was useful, convenient and necessary if he really wanted to declare a trust. He goes on to say:

> "It would be a misfortune indeed to me to lose his confidence after so many years, through any misunderstanding now. The will and codicil provide carefully for the institutions *in which he* was interested, and for the relatives and friends to whom he was attached, and I knew that at the time the papers were drawn the reasons for each paragraph were known and approved by him, the object being to prevent any contest."

There is a strong suggestion, there, from Mr.

Ritch's own pen that this testament was framed and conceived by Mr. Ritch. You have Mr. Ritch's own authority for it that he remembered that Mr. Fayerweather *knew of* these provisions and *approved* them. That is not apt language to describe what Mr. Fayerweather *originated*. It appears, elsewhere, that the institutions to which the executors ultimately tried to deed the residuary estate were not institutions in which Mr. Fayerweather was interested, but the contrary (See Surrogate's Record, Vol. IV, p. 490; Vol. VI, p. 868).

They defied his wishes.

"Mr. Fayerweather never mentioned the names of any institution not in the will, codicils, and memoranda, as institutions to which he was asked to make a gift" (Surrogate's Record, Vol. VI, fol. 2602.) "He did not mention Harvard, Princeton or Brown" (fols. 2600 to 2603).

"Trinity was an Episcopalian institution, and so he did not give it anything. Brown was a Baptist institution and did not get any" (fols. 2601, 2602).

He goes on to say, "I write thus to you because you have known all Mr. Fayerweather's affairs and I believe that you, as well he, believe that I have only tried to do my duty. If at any time you or Mr. Fayerweather want to see me I will call." Mr. Ritch's need to invoke that mode of introduction to the sick chamber of his client was due, as you will be abundantly convinced, to the ill opinion which had been created by Mr. Vaughan in Mr. Fayerweather's mind against Mr. Ritch; and the inauspicious Vaughan influence was known to Mr. Ritch. So far that, instead of going as man to man to Mr. Fayerweather to set himself right, he had to couple his effort to get to him with a manifest confession and apology that he had been

derelict in his duty, which is indicated in this tardy offer to make a declaration of trust. Mr. Fayerweather was wholly disabused of all confidence in Ritch. That this tardy repentance produced no effect upon Mr. Fayerweather has just been shown.

Observe that Vaughan says in his letter to Miss Joyce that he will deliver the "second letter" to-morrow. This second letter was drawn upon the theory *that it was written after compliance by Ritch with the first.* It is a very obvious effort to get a declaration of trust out of Ritch. Inasmuch as it is not truthful (Vol. IV, p. 556), in that it does not arise in the ordinary natural course (your Honors will see that it is written in advance of the matters upon which it purports to be based, namely, the giving up of the will and codicil), it is based on a scheme or plan of action between Vaughan and Fayerweather in which they treat Mr. Ritch as a knave; this is the letter:

"11 East 57th Street,
New York City.
November 13th, 1890.

MR. THOMAS J. RITCH:

Dear Sir.—I have examined my original will and the first, second and third codicils thereto handed by you to Mr. Vaughan at my request."

(Remember that this letter was written at the same time that the letter requesting that Ritch hand the wills and codicils to Mr. Vaughan was written. The letter proceeds:) "By the 10th article of my will I leave my residuary estate to my executors in trust to be equally divided among certain corporations and institutions. By the first codicil *it seems* that I revoked this tenth

article of my will and have made the following disposition of my residuary estate: 'Third, all the rest and residue of my estate of whatsoever character and wheresoever situated the same may be of which I shall die possessed and remaining after the provisions of the ninth paragraph of my will have been fully complied with and carried into effect I give, devise and bequeoth to Justus L. Bulkley and Thomas G. Ritch named in the eleventh paragraph of my said will to them and their heirs forever.' Please advise me *in writing* at once what is the legal effect of this clause, and to whom and how my residuary estate goes in case of death supposing this first codicil to remain in force.

Yours truly,
DANIEL B. FAYERWEATHER."

Was there ever in the history of the law such a letter written by a client to his attorney, six years after he had put his hand to a testamentary devise of that sort? Doesn't it throw a flood of light upon the absolute independence and disregard of any directions of Mr. Fayerweather, in which Mr. Ritch had theretofore conducted Mr. Fayerweather's testamentary affairs? We say, as there had not been handed the will and codicils to Vaughan, when this letter was written, it is plain that both Vaughan and Fayerweather were misleading Ritch *in order to get from him a declaration of trust*, as being a man utterly unworthy of honest treatment and as a knave to be outwitted by any device. We refer to these facts at this time solely to show the condition in which Mr. Fayerweather's mind was toward Mr. Ritch immediately preceding the act, the dying day codicil, which defendants stand on as his testamentary act,

reinstating Mr. Ritch as executor and residuary legatee. We say the circumstances point, and the proofs point to the conclusion that that codicil was an act of violence upon Mr. Fayerweather; that his mind never participated in it, and we bring up these circumstances to show his mind, immediately preceding, toward Mr. Ritch, as a most persuasive illustration and aid to determine whether in fact Mr. Fayerweather's mind went with his hand *when his name was placed at the end of the codicil of November 15th.*

The details of the execution of the dying day codicil are presented in Mr. Blaikie's brief for the cross-complainant, and will not be restated here. We are now concerned with the codicil of November 11th in connection with the Butler assignments.

In the letter to Miss Joyce, after the first letter was delivered by Mr. Vaughan, he says "that the delivery of the second letter would be of little use, Mr. Ritch knew exactly what he was doing." That obviously means that it would be useless to try to get Ritch to make any declaration of trust. Contrary, however, to Vaughan's expectation, Ritch handed to Vaughan this declaration (Vol. IV, p. 225). *which never got to Mr. Fayerweather* (Vol. IV, p. 455). It was addressed to Mr. Fayerweather, however. "The intention of the change in question was to enable Mr. Bulkley and myself to carry out the intention of the will, as modified by the various private memoranda in my possession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion of your estate otherwise than to conform to your wishes. I suggest that I call on you with these, and that they be left in a sealed package with Miss Joyce or anyone named by you. The legal effect

of the clause in question is to vest the title to the residuary estate to Messrs. Bulkley and myself, but, as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under this codicil."

Mr. Vaughan swears that this letter was never delivered to Mr. Fayerweather and that he never communicated its contents (Vol. IV, p. 455; Vol. V, pp. 468, 469, 488, 490, 492). Surely, now, Vaughan has thwarted Ritch's scheme and defeated his residuary clause and estranged him from Mr. Fayerweather forever! That supposition, however, is not sustained by what follows. On the very next day a codicil prepared by Mr. Woodford was taken by clerks of Arnoux, Ritch & Woodford to Mr. Fayerweather's house (Vol. V, p. 457). They are admitted. They say they have an "important paper" for Mr. Fayerweather to sign. They are admitted to him and they bring away the so-called "fourth" codicil, which is admitted to probate. Vaughan says he became satisfied on Friday, Nov. 14th, that Ritch was all right (Vol. IV, pp. 550, 588). It was then that the codicil, to be executed on Monday, but hastened in view of the Doctor's warning, was conceived. It was not ready on Saturday (Vol. IV, pp. 507, 510, 550, 555, 557; Vol. II, pp. 559, 560). But he communicated none of the letters conceived by Ritch to prove he was all right, to the testator, whose executor Ritch was to continue to be (Vol. IV, pp. 592, 593). No doubt Vaughan was satisfied; but was Mr. Fayerweather? What has wrought this change? Has Ritch been restored to confidence and honor? Does he come with the codicil himself to take leave of his client and friend of years, whose good opinion he so

highly prizes, and the loss of which he had so deeply deprecated? If he has been restored to Mr. Fayerweather's confidence, is he not a man to set himself right and get from his dying friend at least the assurance that he trusts him again; that he leaves the world in peace and goodwill toward him? Not at all. Nobody ever suggested at the Fayerweather house that these gentlemen came from Arnoux, Ritch & Woodford. They were admitted because they came with Vaughan, and said they had some "paper" to be signed, and they went into Mr. Fayerweather's room. Would not Mr. Fayerweather, if the foundation had been laid for such a change, and he were so brisk as to jump up in bed and comment on the appearance of his signature, as one of these attesting clerks says he did, have been moved to explain to those inmates of his house who were so dependent upon Mr. Ritch's honor and "discretion" that they might trust him again? If any one, it was Vaughan who brought about this change; but *the mollifying declaration of trust*, which might to some extent account for reinstating Mr. Ritch in Mr. Fayerweather's confidence, *Vaughan kept in his pocket.* Mr. Vaughan did not deliver it to Mr. Fayerweather and never disclosed its contents to him. He says so (Vol. IV, pp. 592, 593, and Vol. VI, p. 455). He cannot remember a word of conversation with Fayerweather to explain or account for this revulsion of feeling (Vol. II, pp. 59 to 61). When your Honors come to that part of this record we hope you will read with such attention as your other engagements will permit, the cross examination by Mr. Coudert of this witness and see the extremes of memory which he shows on the witness stand (Vol. IV, pp. 535 to 557; Vol. VI). The things in

which his memory is nice and accurate, things of passing and trifling importance. The things in which he says again and again and again, "I do not remember." Your Honors remember that Italian witness who became famous in the trial of Queen Caroline on account of his poor memory, "Non mi recordo!" This witness Vaughan can be compared to that witness to his disadvantage. He remembers everything he pleases, and he has an incredible failure of memory.

What Brougham said of that witness may be said of Vaughan, "It is true that men differ in their memories; memory differs, like honesty in man." He cannot remember a word of the conversation with Fayerweather, in which he brought into his mind the suspicions which led to his changing his will and the refusing ever to see Ritch again. He cannot remember a word of any conversation whereby he restored Ritch to that favor and honor from which he threw him down. It is an incredible memory. It is one of the most extraordinary things in the relations of men that ever has been heard of, this relation of Vaughan to Fayerweather in his dying hours. It would impress, as on a table of brass, the memory of the dullest man that ever came in such relations with another. He does not remember. Here is a conversation with Fayerweather, whereby he puts Ritch out of that happiest state (which he then believed Ritch was in, and which he afterwards claimed he himself was in), of being the absolute residuary legatee in his own right, of a million, two hundred and seventy-seven thousand dollars apiece; that is the way they figured it up between themselves; and he cannot remember what he said and what Mr. Fayerweather said, that

lead to that change. He cannot remember how Ritch got back again into good standing and by what means that confidence was restored. But the confidence, such as it was, so restored, did not lead to the disclosure to Ritch of this codicil of November 11th. That was a weapon in reserve. Now if Mr. Fayerweather had been in mind to change what he had undone with so much pains and so much injury to his own health, four days previous to that time, when he had lost confidence in Mr. Ritch; if he had been at the change in sound and disposing mind, would not something had been said or done about the codicil of November 11th? (Vol. II, pp. 575–6; Vol. V, pp. 463–5). The revocation of that codicil rests upon its destruction by Vaughan out of the presence of the testator after the alleged execution of the codicil of November 15th. It is obvious, upon these facts, that Mr. Fayerweather's mind was not changed and that it did not participate in the placing of his name at the foot of the codicil which restored Ritch to his legacy and executorship. To the last he refused to hear Ritch's explanation of his conduct, and that is the testimony in this record (Vol. II, p. 558). Vaughan testified in the Surrogate's Court that he did not show Mr. Fayerweather Ritch's letter, offering to do anything desired, because Mr. Fayerweather declined to read it (Surrogate's Record, VI, pp. 675, 688). What things they did to his poor, dying body can only be inferred. That he laid his treatment to Vaughan appears. Afterwards, when Vaughan came into the room in his last moments, Mr. Fayerweather ordered him out (Vol. II, p. 565). He could not tell about it. He said to Miss Joyce, "I want to tell you something", and then became unable to finish (Vol. II, p. 565).

Now, what is it that accounts for this testamentary change? Vaughan had been shocked when he learned how Ritch had prepared the means whereby he could convert this vast wealth to his own use (Vol. II, p. 548). We can understand what reconciled Vaughan. It was because Ritch, in the vulgar phrase, "took him in on the ground floor." He says his distrust was removed when Ritch showed him the private memoranda (Vol. VI, p. 712). He testified that he understood the scheme of the will and codicils made the residuary legatees absolute heirs (Vol. IV, pp. 536, 549). Then, when he was asked, he understood that he became an absolute heir. Now, these are very important statements,—if he meant by them, that Ritch showed him the evidence of the trust coupled with a purpose to perform it, and that he, Vaughan, was added, to make assurance doubly sure, everything is explained. But if Ritch explained to him that those memoranda were not binding and that they could be evaded and withheld and repudiated; that they could keep the fund for themselves, what then? The only change which that codicil made was to add Vaughan to the residuary legatees; that is all. He swears that very morning he took instructions from Mr. Fayerweather for changes in his will, and he produces a paper, which, he says, he took down on that morning from Mr. Fayerweather's lips, respecting various legatees, Exhibit Oa (Vol. IV, pp. 583 to 585). THOSE CHANGES, WHICH ARE THE ONLY LEGITIMATE OCCASION WHICH HAS BEEN SHOWN FOR ANY ADDITIONAL CODICIL, ARE NOT IN THAT CODICIL. There is only one *satisfactory* way to judge of what men intend, and that is by ascertaining what they have done.

Mr. Fayerweather died about eleven o'clock that night. Thereupon they all started in to do the very thing that Ritch had prepared to do. The thing that Vaughan had persuaded Mr. Fayerweather that Ritch was a scoundrel, because he had prepared the way to do it. They claimed the *residuum* for themselves. As Vaughan said on the witness stand in the Surrogate's Court, when they were denying, upon their oath, the existence of any secret trust, "It was an absolute gift" (Vol. IV, pp. 536, 549). He repeated it in the Five College trial (Vol. IV, p. 598). They procured an adjudication that they were liable to the collateral inheritance tax as residuary legatees not subject to any restriction or trust. They then set up that allegation as a bar in the action in the State Court (Five College Record on file, p. 1090). Observe the categorical denial in their answers there (pp. 43, 53) of everything, now firmly established, in the interest of the assertion of personal, absolute ownership of the residuary estate. When the disclosure in the Surrogate's Court of the secret trust became public by the production, under compulsion, of these later letters, which if the first three writings are dubious, show very clearly what the secret trust was, it became evident that they could not themselves any longer hold the fund as their own. That was very plain to the dullest comprehension. "All was lost but honor." Then Mr. Parsons came to their aid and tried to retrieve that by the deed of gift (Vol. IV, p. 579). As the State Courts have held, that was as much a breach of honesty as to spend it themselves, and that they are trustees, *ex maleficio*. Whether they are trustees for complainants or for the 20 institutions, the description is equally pertinent, *ex maleficio*.

If the codicil of November 15th was not Mr. Fayerweather's testamentary act, then what remains for consideration is the fact of the destruction of the codicil of November 11th. Vaughan starts with the statement that Miss Joyce destroyed it, makes that unqualified statement (Vol. IV, p. 540). After Mr. Coudert had cross-examined him, he ends by admitting that Mr. Fayerweather nodded his head (and it appears on the last day that is what he did to all questions), when after the 5th codicil had been taken away Vaughan showed him an envelope and said, "Do you want this destroyed?". Vaughan then asked Miss Joyce to burn the envelope. Vaughan said that Miss Joyce could not, and *did not, know what was in the envelope.* It is equally clear that Mr. Fayerweather could not. Vaughan said he got Miss Joyce to burn it *because he wanted a witness*, but he took care that the witness should not be able to contradict his version of the contents of the envelope (Vol. IV, p. 541). May testamentary papers be thus nullified? Certainly not in New York. This act of Vaughan will not prevent the establishment of that codicil thus destroyed, in the proper tribunal. That the Circuit Court, is such is discussed under the first group of assignments. Thus by a *prima facie* case the very title of these defendants to this fund is impugned. The assignments in question should be sustained.

The contentions peculiar to Hamilton are unsound.

A.

Hamilton's separate decree was not a final decree;

the Court still retained control over the entire cause and the cross bill did not, for that reason, fall with the decision upon the original bill. The election of Hamilton, after its amendment, to stand upon the plea and record made under the original bill was fatal to a judgment dismissing the amended, original bill. The decision was still within the control of the Circuit Court and should have been recalled and judgment rendered in favor of complainants against the pleas, both on the amended, original bill and the cross bill, against Hamilton and all defendants in like case with Hamilton.

A decree is not a final decree which does not dispose of the whole case against all the parties.

Thompson *v.* Dean, 7 Wall., 342.
Frow *v.* Vega, 15 Wall., 552.
Moore *v.* Huntington, 17 Wall., 417.
Thomas *v.* Woolridge, 23 Wall., p. 286.
C. & N. R. R. Co. *v.* Union Rolling Mill Co., 109 U. S., pp. 714, 715.

The time to appeal from Hamilton's separate decree has not only not expired, but has never commenced to run.

We concede and insist that a suit in equity is entirely within the control of the court until final decree enrolled and that it was competent for the court to recall and annul the decree dismissing the bill as to Hamilton and render judgment against that defendant upon its pleas to both bills.

Webb *v.* Buckalew, 82 N. Y., 559.
Furnald *v.* Glenn, 26 U. S. App., p. 210.
Frow *v.* de la Vega, *supra*.

As shown above, the plea, if good to the original bill before amendment, was no longer so after amendment.

Occasion for a cross bill arises when and because a defendant is not satisfied altogether with the grounds on which a complainant rests his claims to the property brought into litigation, and where he desires to bind co-defendants by *his* theory and proof. If he gets a more drastic and satisfactory result upon his theory, as if he subjects to the decree the entire estate, instead of half of it, that, certainly, is not a reason for holding that the subject-matter is different.

When discussing the point of *res adjudicata*, the counsel for Hamilton insisted that embraced within the subject-matter of the Five College Action were all issues and all grounds of contention which could affect the title not only to the residuary estate but to the whole estate, upon a decision that a probate of the will of 1884 was invalid. The argument is that within the disposition of the subject-matter there was the right and duty to litigate all such questions, and that, accordingly, all such questions are concluded. It does not, therefore, lie in his mouth to say that the inclusion of the topics presented by our cross bill is not germane to the amended, original bill.

B.

The cross bill of Reynolds is a true cross bill; the series of orders so treating it and the decision sustaining it as such should stand.

C.

The Reynolds cross bill was allowed before the

entry of the decree dismissing the amended original bill. It was, therefore, an effectual reservation and qualification of the effect of the interlocutory dismissal which retained the cause in Court for the purpose of a cross bill.

Pullman Car Co. *v.* Trans. Co., 171 U. S., 150.

Timely objection to that course was not taken. The objection was taken January 2, 1901, and it was not then true that an interlocutory decree had been rendered dismissing the bill. That was not done until January 14, 1901.

D.

The ancient citations that new parties may not be brought in by cross bill are no longer of force.

Brandon Mfg. Co. *v.* Prime, 14 Blatch., 371.

E.

John B. Reyholds, as executor of Lucy Fayerweather, is entitled to administer the personalty of his testatrix, and she had not only an interest as a legatee under the will asserted to be the last will of her husband, but she had a statutory interest in the entire estate, if the probate of his will shall be annulled and the estate distributed as in case of intestacy.

Concerning the North Western University.

This appellee rests upon an estoppel based upon supposed consent to its taking in the State Court.

There was nothing parted with, this defendant gave and omitted nothing in reliance thereon. The concession was part of a general claim, which is an entirety, and when the complainants was turned out of Court, the fact merely that they did not present any issue as to this defendant, did not in anywise estop them here. They took with them the issues which they raised and which they might have raised, all being at large.

There was an utter lack of title, on the face of every pleading, so far as this defendant was concerned. The basis of the decision in its favor was that the only persons *interested*, which were held not to embrace these complainants, consented to their taking (Vol. IV, p. 49). After it became apparent that these complainants were the only persons interested, the bottom fell out of that adjudication. In any litigation where the rights and *status* of these complainants are at large, the claims of the Northwestern University must rest upon legal right. As to that defendant, no pleading states any cause of action in its favor. The memorandum which alone mentions it, is not a testamentary paper, and cannot be the basis of any valid judgment.

Where it appears upon the face of the record that a judgment rests upon no valid cause of action, it will be given no collateral effect.

FULLER, C. J., in

Brownsville *v.* Loague, 129 U. S., 493.

Complainants and cross complainant should have a final decree upon the pleas as answers against all defendants, awarding them at their

election their respective statutory shares of the entire estate as in the case of intestacy; or of the residuary estate under the proper will; the defendants should be required to account for the sums received by them, with annual rests. There should be appropriate directions to effectuate these conclusions.

These pleas and this demurrer while in form first dilatory pleas, follow, in fact, several others. There is no absolute right to plead-over. The defendants have exhaustively presented their case, for what is not presented in evidence here, is presented by the introduction of the Five College record in its entirety.

The defendants have overruled their pleas by going into evidence at large upon the merits. In introducing all the evidence in the Five College action, Hamilton overruled its plea; as much as did the others in calling Reynolds, Browning, Edgar, Bishop and Grout, and, to create an estoppel *in pais*, introducing the complainants' briefs in the State courts. These depositions had no relation to the issues upon the special pleas or supporting answers. The consequence is well settled. This overruled the pleas and converted them into answers. As such, they state no valid defense, and *the prima facie* case made out by complainants and cross complainant, sustain a final decree, as now prayed.

If complainants are not entitled to final decree, they should have a decree against defendants upon the pleas with costs, reversing the decree appealed from and directing further proceedings in harmony therewith.

ROGER M. SHERMAN,
Solicitor for Complainants-Appellants,
City Hall,
Mount Vernon, N. Y.

ROGER M. SHERMAN,
Of Counsel for Complainants and
for John B. Reynolds, as Executor, Cross-Complainant.

N. Y. STATS. OF 1848.

"Limit of devises to certain corporations by persons having relatives.

No person having a husband, wife, child or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)."

CHAP. 360, N. Y. STATS. OF 1860.

"Legacies to society, when valid.—Any corporation formed under this act, shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife, or child or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

SUPREME COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

JOHN B. REYNOLDS as Sole Executor, Etc.

vs.

THOMAS G. RITCH and others, Individually and as Trustees, *et al.*

Brief on behalf of the widow and next of kin on the question of res adjudicata.

I.

The decision of the Circuit Court of Appeals on the appeal from the order of Judge Lacombe reversing the order for a preliminary injunction does not conclude the court here on the question of the effect of the judgments of the State court

in the Amherst College case as *res adjudicata* of the question as to the validity of the releases.

There is an entirely new element presented in the present case not considered by the Circuit Court of Appeals, and which could not have been considered under the averments in the original bill.

That element is the want of jurisdiction of the General Term which reversed the decision of Judge Truax to determine the question of fact whether the releases were void for fraud or other reasons.

1. Judge Truax's decision proceeded upon the ground that the whole estate passed by the will and codicils to Ritch, Bulkley and Vaughan upon a secret trust for the twenty colleges, and that as the twenty colleges did not take the residuary estate under the will but through the operation of the secret trust binding upon the conscience of the trustees, there was no violation of the statute of 1860 although the effect of the will in connection with the secret trust was to give the whole residuary estate to the twenty colleges.

2. The ground of Judge Truax's decision rendered it unnecessary for him to consider the question of the validity of the releases. Manifestly if the whole estate passed by force of the will and the secret trust to the 20 colleges the widow and next of kin have nothing to release, and it was wholly immaterial whether the releases were procured by fraud, deception or any act on the

part of the trustees inconsistent with a fiduciary relation. The ground of Judge Truax's decision appears unmistakably in the decision and judgment. He did not consider or determine whether the releases were valid. It did not need his oral evidence upon this point, because without it the inference from his opinion and decision permits no other conclusion. But the oral evidence removes all doubt upon the point if without it any doubt could have existed.

3. It is therefore an indisputable premise that the Judge at Special Term on the trial of the Amherst College case did not consider or decide any question as to the validity of the releases.

If it be assumed (see Judge Wheeler's opinion *contra*) that the pleadings in that action put in issue within the doctrine of *res adjudicata* the validity of the releases, and that Judge Truax's decision that the issue was immaterial was a trial and determination of that issue which, for the time being, concluded the widow and next of kin from asserting any claim as against the releases, nevertheless upon a reversal of the ground of Judge Truax's decision upholding the title of the 20 colleges under the will and secret trust it would necessarily follow that from that time the question of the validity of the releases was set at large and must be decided by a competent tribunal upon its merits against the widow and next of kin before they could be concluded.

4. It is a fundamental principle of our juris-

prudence that a litigant is entitled to have every material question of fact determined by a tribunal duly constituted and authorized to pass upon and decide the facts. The right of trial by jury in legal actions is secured by constitutional sanctions. In equity actions the Chancellor sitting on the trial may hear and decide questions of fact material to the exercise of his jurisdiction with or without the aid of a jury. But powers of courts of review, both in cases at law and in equity are regulated by law. Their function is usually limited to the review of errors of law or fact alleged to have been committed on the trial. Under our system an appellate court never can act as a tribunal in first instance to determine *de novo* what the fact is which is in controversy in the absence of express statutory authority.

5. In disposing of a case on the appeal from Judge Truax's judgment the General Term (as will be hereafter shown), did undertake to decide the question of fraud in obtaining the releases *de novo*, which question had never been passed upon by a tribunal of first instance, and to affirm the judgment on a ground wholly inconsistent with that upon which the original judgment proceeded.

6. The General Term (as will be shown), in determining the question as to the validity of the releases exceeded its jurisdiction. The Circuit Court of Appeals in holding that the decisions of the State Courts in the Amherst College case were *res adjudicata* erroneously assumed that the General Term possessed jurisdiction to make an origi-

nal finding of fact upon the issue as to the validity of the releases.

This error was occasioned by a mistaken averment in the original bill to the effect that the General Term, as an Appellate Court, had jurisdiction to determine the question of fact as to the validity of the releases, although it had not been passed upon or found by the trial court. This jurisdiction is denied in the present bill. The original bill has been amended so as to present this question.

If the objection to the jurisdiction of the General Term now urged is well taken, it removes any obstacle in the way of this Court growing out of the decision of the Circuit Court of Appeals, because that decision is founded upon a mistaken admission of such jurisdiction. It presents a different case from that in which the opinion of Judge Wallace was rendered.

II.

The doctrine of *res judicata* rests upon a principle of public policy which requires that a case having been once decided there should be an end of strife and litigation. "There are," said Mr. Justice Miller, in U. S. *vs.* Throckmorton (98 U. S., 65): "No maxims of law more firmly established or of more value in the administration of justice than the two which are designed to prevent the

repeated litigation between the same parties in regard to the same subject of controversy, namely: '*Interest reipublicae ut sit finis litium;* and *nemo debet bis vexari pro una et eadem causa.*' "

To render this public policy effective it is a conceded part of the doctrine of *res adjudicata* that a judgment of a court acting within its jurisdiction, so long as it remains unreversed, is conclusive upon the parties in a subsequent litigation although it may be made to appear that the court in rendering the former judgment was mistaken in the law, or that the facts were wrongly found by the court or jury. The judgment is not impeachable in a subsequent action for the same cause for errors of law or fact of the tribunal having jurisdiction to decide and acting within its jurisdiction. The contrary principle would strip the doctrine of any substantial reason. The ordinary remedy for errors of law or fact is to be found in a bill of exceptions or a motion for a new trial.

But constituting a part of the doctrine of *res adjudicata* are two principal conditions rooted in the immutable foundation of justice:

First.—That before a party can be concluded by a former adjudication affecting any property-right, he must have a hearing, or an opportunity to have been heard, on the point in controversy, and

Second.—That the adjudication relied upon must have been made by a court or tribunal of

competent jurisdiction, authorized to pass upon the question, and to render the decree affecting the right embraced in the adjudication.

There are other subordinate, but nevertheless essential rules, governing the application of the doctrine, and regulating its practical enforcement. Among these is the rule that the matter of fact as to which the estoppel is claimed, must have been directly, and not merely collaterally or incidentally involved in the former suit; and the further rule that it must appear from the record in the former suit, or from the record aided by extrinsic evidence, not doubtfully or inferentially, but clearly and beyond all doubt, that the very question in issue in the second suit was passed upon and decided, or might have been passed upon or decided in the former one. All doubt or ambiguity is resolved against the estoppel, and sets the matter at large. In the language of Lord De-Grey in his celebrated opinion in the Duchess of Kingston's Case: "Neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

III.

The two principal conditions to which we have

referred attending the doctrine of *res adjudicata;* namely that before a former judgment can operate as an estoppel in a subsequent action, it must appear that the party sought to be estopped had a hearing, or an opportunity to be heard, and secondly, that the court or tribunal rendering it must have had jurisdiction, are elementary, and do not require the citation of authorities in their support. As to the first condition mentioned, the law is accurately stated in the opinion in the case of Munday *vs.* Vail (34 N. J. Law Rep., 418), cited with approval in Reynolds *vs.* Stockton (140 U. S., 254), viz.: "It is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive effect to matters adjudicated, and this is the principal reason why judgments become estoppels." The reason for the second of these conditions is tersely given in Herman on Estoppel, Sec. 68, and is supported by the cases cited: "If without jurisdiction, the court cannot adjudicate the real merits of the case."

It is important in the present case to consider in what the jurisdiction of a court or tribunal consists, and in what cases there is such an absence of jurisdiction as to deprive an adjudication of any force as an estoppel in a subsequent litigation.

General definitions of jurisdiction are found in many cases. Mr. Justice Brewer in Reynolds *vs.* Stockton (140 U. S., 268), says: "Jurisdiction may be defined to be the right to adjudicate the subject matter in a given case."

Jurisdiction is conferred by the sovereign power and authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Am. & Eng. Encyc. of Law, 2nd Ed., Vol. 17, page 1060.

Of course to constitute jurisdiction in any personal action, the tribunal deciding must have jurisdiction of the person to be affected by the decision and of the subject matter.

It is often loosely asserted in general definitions that if the party has been properly brought in by notice or summons, and the court is invested with power to hear and decide, jurisdiction is completely acquired, and all that follows, whether decision, judgment or relief is within the jurisdiction, and however erroneous the particular decision, judgment or relief may be such errors do not affect the jurisdiction, and are remediable only by a direct proceeding in the particular case, and are not available on the question of *res adjudicata.*

This is a very imperfect view of the subject. Jurisdiction consists not only in the power to hear and determine, but also the power to render the particular judgment entered in the particular case. There may be the most complete jurisdiction of the person and the general subject matter, but if the court in rendering the judgment transcends the limitations of its powers, as defined by statute or as regulated by the character of its functions, the judgment is void for want of jurisdiction. This doctrine has been declared in fre-

quent decisions of the United States Supreme Court.

Bigelow *v.* Forrest (9 Wall., 339).
Ex parte Lange (18 do., 160).
Windsor *v.* McVeigh (93 U. S., 93).
Ex parte Yarborough (110 do., 151).

In Windsor *v.* McVeigh, (*supra*), Mr. Justice Field said: "The doctrine invoked by counsel that when a court has once acquired jurisdiction it has a right to decide any question which arises in the cause and its judgment however erroneous cannot be collaterally annulled, is doubtless correct as a general proposition. But like all general propositions is subject to many qualifications in its application. * * *

The doctrine stated by counsel is only correct when the court proceeds after acquiring jurisdiction of the cause according to the established modes governing the cases to which it belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it."

In *ex parte* Lange, *supra*, it was held that a judgment in excess of jurisdiction was void although the court had jurisdiction of the person and subject matter. Miller, Justice, said: "It is no answer to this to say that the court had jurisdiction of the person and of the offence under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case."

In Bigelow *v.* Forrest, *supra*, in a case arising under the confiscation acts, the decree ordered a sale of the whole estate of the owner in the land,

whereas, by the act of Congress the sale was limited to an estate during the life of the owner. In an ejectment by the heirs of the owner it was claimed by the purchaser that the judgment of the District Court condemning the whole estate of the owner in the land and directing it to be sold was conclusive; that although this part of the decree was erroneous it was not void and could not be impeached collaterally. But the Court said: "Doubtless a decree of a court having jurisdiction cannot be impeached collaterally, but under the act of Congress the District Court had no power to order a sale which should confer on the purchaser rights outlasting the life of the owner. Had it done so, it would have transcended its jurisdiction."

Justice Miller in *Ex Parte* Yarborough, *supra*, a habeas corpus case, said: "If the court had jurisdiction of the party and offence for which he was tried and has not exceeded its powers in the sentence pronounced, this court can inquire no further."

In the Tweed case (60 N.Y., 559) it was held that the jurisdiction of the court to render the particular judgment is a proper subject of inquiry on habeas corpus.

The cases cited established the principle that a judgment may be impeached collaterally for want of jurisdiction, not only when no jurisdiction was acquired of the person or the subject matter, but also where the court, although having jurisdic-

tion of the person and the subject matter transcended its power in awarding judgment. In other words, the judgment will be void if the court transcends in the relief awarded, although there is no defect of jurisdiction of the person or of the cause.

IV.

The series of decisions in the Amherst College Case in the State Courts, namely, the decision of Judge Truax at Special Term; the decision at General Term, and the decision on appeal to the Court of Appeals, taken together, and in the light of extrinsic evidence, did not constitute an adjudication as to the validity of the releases which precludes the complainants from a trial of that issue in the present case.

1. It is claimed by the complainants here that the question of the validity of the releases was not a point at issue in the Amherst College Case, within the doctrine of *res adjudicata*. This point was considered and determined by Judge Wheeler in his opinion on the demurrer to complainant's bill, and will be presented on the briefs of other counsel for the complainants here.

But assuming that the point of the validity of the releases was, in a proper sense, in issue in the Amherst College Case, and that the decision of Judge Truax that the issue was immaterial was

an adjudication of that issue which, until reversed, concluded the complainants from asserting any rights in the estate as widow and next of kin, *nevertheless* it is manifest that upon a reversal of Judge Truax's decision the property passed to the twenty colleges by virtue of the will and codicils, and the sceret trust free from the operation of the statute of 1860, and a holding that on holding that on the death of the testator one-half of the estate over and above the special legacies to persons other than the colleges vested in the widow and next of kin, the question of the validity of the releases was then open and a determination of that question on the merits against the complainants was necessary before the estate could be taken from them.

There can be no question as to the ground of the judgment rendered by Judge Truax. It appears from the pleadings in connection with the findings. His opinion confirms what is disclosed by an examination of the pleadings and judgment alone, and finally the oral evidence establishes without question that he went upon the ground that there was a valid disposition of the whole residuary estate by virtue of the will and the secret trust to the twenty colleges. This was so understood by the appellate courts, as is shown by their opinion and the oral evidence of Chief Judge Parker.

2. The next judgment to be considered is the judgment of the General Term, which in form affirmed the judgment of the Special Term.

Assuming that the judgment of the General Term unexplained would justify a presumption that it affirmed the ground on which the judgment of the Special Term was based, namely: That the will and codicils in connection with the secret trust was a valid disposition of the whole residuary estate to the 20 colleges, and that the widow and next of kin took no interest therein as distributees next of kin took no interest therein as distributees then it would be open for the defendants here to urge that the judgment of the Special Term, having been affirmed by the General Term, that judgment, if *res adjudicata* when rendered on the question whether the widow and next of kin ever had any rights in the residuary fund, continued so to be on its affirmance by the General Term.

(It will be borne in mind that we have assumed for the purposes of this argument that the judgment of the Special Term did dispose of the issue of fraud in the releases in holding that the whole estate passed under the will and the secret trust, leaving nothing upon which the releases could operate.)

But the General Term did not affirm the ground of the decision of Judge Truax. It subverted the whole basis of his decision. Instead of holding that the device of a secret trust took the case out of the operation of the statute of 1860, the General Term held that the gift in substance was a gift to the 20 colleges, and was subject to the prohibition of that statute, and effective only to the extent of one-half of the estate remaining after deducting the special legacies other than those to charitable corporations.

It must be conceded, because it cannot be denied that the General Term upheld the contention of the widow and next of kin that upon the death of Mr. Fayerweather one-half of such remainder was not validly disposed of by the will, and passed to them under the statute of distributions. The opinion of the General Term and the evidence of Chief Judge Parker remove all doubt upon this point.

The necessary result of this holding of the General Term was to open the issue as to the releases. This issue had to be disposed of in favor of the 20 colleges before they could claim any right to one-half of the residuary estate. Thenceforth their title depended solely on the releases. If the releases were invalid for fraud or other reason, the 20 colleges were out of the case.

Upon the issue of fraud in fact, the widow and next of kin had had no hearing. They had been excluded from having that issue determined at Special Term by the erroneous ruling of Judge Truax that the issue was immaterial.

The question then arises as to the jurisdiction of the General Term in dealing with the issue as to the validity of the releases.

The jurisdiction of the General Term is defined by statute, and the error of the General Term arose out of inattention, and a misconception of its powers as a court of review. The jurisdiction of the General Term (so far as material here) is prescribed in Sections 1317 and 1022 of the New

York Code. Section 1317 prescribes that the General Term upon an appeal from a judgment, etc., "may reverse or affirm wholly or partly, or may modify the judgment or order appealed from * * * and as to any or all the parties, and it may, if necessary or proper, grant a new trial or hearing."

Section 1022, as it stood when the General Term decided the case, prescribed that on an appeal from a judgment the "General Term of the Court in which the action is pending shall review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to."

Until the decision of the case of Benedict *vs.* Arnoux (154 N. Y., 126), decided by the Court of Appeals in 1898, the opinion was quite prevalent both at Bench and Bar that under Section 1022 full jurisdiction was vested in the General Term, or Appellate Division, to exercise an original jurisdiction on an appeal over the facts, and to reverse or affirm and render final judgment in accordance with its findings of the facts. It was doubtless under this misconception that the averment of jurisdiction in the General Term to decide the facts and to render final judgment thereon was made in the original bill, and under which the General Term acted in deciding the appeal.

But the construction of the two sections of the Code, to which reference has been made, was conclusively settled and declared in the case of Bene-

dict *vs.* Arnoux, *supra.* That was an equity case tried in the City of New York, in which a judgment was rendered at Special Term in favor of the plaintiff upon findings of fact made by the Trial Judge. The defendant appealed to the Appellate Division of the First Department; and the General Term reversed the judgment on the facts, and rendered final judgment thereon for the defendant. On appeal to the Court of Appeals that court reversed the judgment of the Appellate Division on the ground that under Sections 1317 and 1022 of the Code, the Appellate Division had no power of reversing the judgment on the facts to exercise an original jurisdiction to decide the facts, and render a final judgment on its findings. It is worthy of notice as bearing upon the misconception by the General Term in the Amherst College case of its powers, that the same misconception existed in Benedict *vs.* Arnoux, a case decided in the same department.

The case of Benedict *vs.* Arnoux established these propositions:

1. It affirmed the undoubted principle that no person can be deprived of his property by the judgment or decree of a court, or judicial tribunal, acting without, or in excess of its jurisdiction.

2. That the General Term was not invested with any original jurisdiction, either in a legal or equitable action, to find facts which had not been found by the trial court, and render judgment upon facts so found. It had power to affirm a judgment upon

facts found by the court of first instance, or to reverse such finding. But it could not, in a case where the facts had not been found by the court below, proceed *de novo*, and assume the power to determine the fact in controversy. If the fact in issue had not been passed upon by the trial court, and was material, the sole power of the General Term was to remit the case to the tribunal of fact for determination by the court or jury having original jurisdiction to try the fact. Judge Haight, in rendering the opinion of the court, said: "It is one of the fundamental principles of our law that questions of fact are to be tried and determined in a court of original jurisdiction, and it is not the appropriate function of an appellate court to determine controverted questions of fact, and render final judgment upon such determination. It is only where the facts are conceded or undisputed, or established by official record, or found by the trial court, that such court is justified in awarding final judgment."

Again "This would be substituting another tribunal from that known to the Constitution and laws for the trial of causes."

Even if the appellate court was of opinion that the facts proved did not justify a finding in favor of the complainants here on the issue of fact, it could not render final judgment against them on that issue, unless it had been found against them by the trial court; for the reason as stated by Judge Haight in his opinion, that it cannot be said "that other evidence may not be found which would sustain the plaintiff's contention on a new trial."

The record shows that evidence was given on the trial to sustain the issue of fraud in procuring the releases of the most convincing character.

1. The nature of the transaction itself carries with it irresistible evidence of overreaching on the part of the trustees. They secured from the widow and next of kin releases of an unquestioned interest of about three million dollars for the sum of $310,000 paid out of their own money. The indignant language of Lord Cairns in Thomson *vs.* Eastwood (2 Law Rep. App. Cases, 233), in a case where trustees had secured the discharge of a legacy of three thousand pounds upon payment of three hundred pounds is applicable in this case: "My Lords, that, of course, is a transaction which, unaffected by any question of length of time, or acquiescence, or change of circumstances, could not be allowed in a court of equity to stand for one moment."

2. The trustees in procuring the releases were dealing with their fiduciaries. They cannot escape by alleging that they denied the existence of a trust. That character the law indelibly stamped upon them. Their conduct is to be measured by the actual legal relation in which they stood to the widow and next of kin. The suggestion that they were justified because they were dealing with the widow and next of kin "at arms length" would, except for the unguarded language in the opinion of the Court of Appeals, seem to be unworthy of notice. It is clear that they did not occupy and could not occupy that attitude in their dealings with the widow and next of kin.

3. The fact that in making the settlement and in executing the releases the widow and next of kin had the advice of counsel, is a fact to be considered in the final consideration of the question of fraud by a trial court. In some cases it would be entitled to weight. It is incomprehensible how reputable counsel could have advised the settlement in view of the clear legal rights of the widow and next of kin. The counsel evidently acted upon a mistake, and were themselves deceived. But the fact of independent advice was supplemented by the affirmative intervention of the trustees themselves to induce the settlement. They did not leave the matter to be determined between the widow and next of kin and their counsel. They were active agents in securing the settlement. They persisted in the groundless assertion that they were the absolute owners of the estate; they threatened the widow and next of kin with interminable litigation unless they acceded to the wishes of the trustees, who meanwhile withheld any means of support; they appealed to the fears of the contestants, in the letter written to Mr. Beardsley of December 13, 1890 (written to be shown to the widow and Miss Joyce, and which was shown to them) by suggesting that if they should succeed in setting aside the will of 1884 and the codicils, it would result in the proof of a prior will less favorable to them, but without disclosing the contents of such prior will. The prior will of 1880 was introduced on the subsequent trial in the Amherst College Case. It was distinctly *more* favorable to the widow and next of kin, because it gave the whole residuary estate, in terms, to educational institutions. And if that

will had been established there could be no pretense of an absolute gift to the trustees, and no question could have arisen as to the application of the statute of 1860. Surely the trustees cannot be heard to assert that in the settlement, the widow and next of kin acted upon independent advice, and should, therefore, be concluded; when they actually interfered by menace and appeals to the fears and necessities of the widow and next of kin, and by unfounded assertions of title, to induce the widow, enfeebled by age and disease, to purchase her peace, and relinquish her lawful rights in the estate.

Without further going into the evidence on the trial before Judge Truax, tending to establish the fraud alleged, what has been stated is sufficient to show that this issue was supported by abundant evidence.

The General Term confronted by the decision of Judge Truax that the case was taken out of the statute of 1860 by the gift to the trustees, absolute in form although in equity a gift to the twenty colleges, was called upon to pass upon this question, and it held that the statute of 1860 applied, and that one-half of the estate, after deducting the personal legacies, was not validly disposed of by the will and codicils, but was distributable to the widow and next of kin under the statute. This (as we have said) left the issue of fraud in procuring these releases undetermined. But the court instead of reversing the judgment, and directing the trial of this issue, proceeded it-

self to decide the issue, and having found against the alleged fraud, affirmed the judgment. This was sheer usurpation. The only power which it could legally exercise was to order a trial of this issue in a court of original jurisdiction. That the court proceeded in disposing of the case as we have indicated, plainly appears in its opinion and the oral evidence. In its opinion the General Term disposed of the issue of fraud as follows:

"The difficulty with their contention is that the widow and heirs released all their interest in the estate for valuable considerations paid to them. * * * It is urged that these releases were procured by fraud and undue influences. There is no evidence in the record justifying this contention. The terms of settlement were agreed upon during a controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy, and in the settlement, by distinguished counsel, and acted under their advice. The residuary legatees not having any personal interest in the residuary estate, and the widow and heirs having released all their interest therein, there is no person who is entitled to raise the question that the residuary clause was void under the act of 1860."

In thus dealing with the question of fraud the court acted upon a misconception of its powers as triers of fact.

It is impossible to suppose that the court intended to say that there was no evidence in the record, having a legal tendency to establish the

alleged fraud. But it having been assumed that it possessed an original jurisdiction to determine the fact, it said, in substance: "As triers of the fact we determine that the contention that the releases were obtained by fraud is not sustained." That this was the attitude of the court is apparent from the clause in the opinion following the statement that the record does not justify the contention that the releases were obtained by fraud. The court in the following clause recites one of the facts bearing upon the defence of fraud, namely, that the settlement was made under the advice of counsel; an important fact surely, but only one of the facts which was entitled to consideration on this issue. The cross-examination of Chief Judge Parker, one of the judges who sat at General Term, very clearly confirms this view. He says that he has no recollection that the judges considered the sections of the Code defining the jurisdiction of the General Term. It is to be remembered that the counsel for the widow and next of kin mistakenly assumed that the General Term had power to decide the question of fraud *de novo*, and asked that it should direct final judgment on this issue in their favor.

Judge Parker was asked whether the judges decided "that none of the evidence adduced by the widow and next of kin before Judge Truax had any legal tendency to establish the charges of fraud or other charge in their answer to impeach the settlement and the releases. His answer was, "(*a*) My recollection is not very distinct, of course, but it is not that there was not any evi-

dence, but that there was not sufficient evidence to impeach them."

Being asked whether the court decided the theory upon which Judge Truax decided the case was erroneous he answered "A. I think they did, and necessarily were led to do so (*i. e.* affirm the judgment) on the theory that the evidence did not require a finding that the releases were fraudulently procured."

The evidence of Judge Parker distinctly shows that the General Term, in affirming the judgment, acted under the misconception that it had original jurisdiction in the first instance to find the facts, although they had not been found in the court below, and order an affirmative judgment based on such findings.

It is also clear that the Court of Appeals, although holding itself concluded, when examining the fact of fraud did not understand that there was no evidence to sustain the issue. Judge Vann says:

"This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases, out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law."

Finally, although the evidence may not have

satisfied the General Term upon the issue of fraud, nevertheless it could not proceed to render final judgment on that issue against the widow and next of kin, because, as said by Judge Haight in Benedict *vs.* Arnoux, *supra,* "It cannot be said that other evidence may not be found, which will sustain the plaintiff's contention, in the event of a new trial."

The General Term erred in directing final judgment on the question of fraud. It was a jurisdictional error, and a judgment without, or in excess of, jurisdiction, is always open to collateral attack.

3. I assume that it will not be claimed that the judgment of the Court of Appeals is material on the question of *res adjudicata.* The jurisdiction of that court excluded it from reviewing the facts. It was bound by a conclusive presumption that the facts supported the judgment, without any inquiry as to the truth.

"If any question of fact or liability be conclusively presumed against him, there is not due process of law."—*1 Herman on Estoppel, Sec. 69 and cases cited.*

V.

1. The fact that it was claimed by the counsel for the widow and next of kin before the General

Term that the court had jurisdiction to find the facts and render final judgment thereon, creates no estoppel.—*Union Bank* vs. *Bush (36 N. Y., 637)*.

2. Oral evidence is always competent to show the ground upon which the court proceeded in awarding judgment. The only limitation which has been suggested is that such evidence must be consistent with the judgment. The oral evidence in this case was consistent with the judgment. It did not contradict the judgment rendered by Judge Truax, or the judgment of the General Term affirming it. It simply disclosed the error of the court in the judgment which it rendered.

VI.

In conclusion: The doctrine of *res adjudicata*, if applied in this case, will defeat justice. The widow and next of kin will be despoiled of their inheritance by an instrument which, as they contend, was obtained by chicanery and fraud, and by a violation by trustees of sacred obligations. They have in every court insisted that the instrument was void for fraud and overreaching, but this issue has never been determined on the merits by any court of competent jurisdiction. They have a constitutional right to such a determination before they can be deprived of their property.

The principle of *res adjudicata* is founded upon public policy that there should be an end of litigation, *after* an opportunity has once been given for a fair trial of the right. It cannot be used as a snare to entrap men into a loss of their property, upon *presumptions* or intendments contrary to the truth. The party who seeks to close the mouth of another by the estoppel of a former judgment must bring himself clearly within the principle. If the case is doubtful, or if the matter is capable of two inferences, one of which would leave the case at large, that inference will prevail. We assert that, judged by these acknowledged principles, the plea of *res adjudicata* in this case must fail.

We may recur to the words of Judge Cooley (Cooley on Lim., Page 405, cited in Herman on Estoppels, Page 555) who in speaking of the meaning of the words "due process of law" in the Fourteenth Amendment of the United States Constitution when applied to judicial proceedings, says:

"They mean a course of legal proceedings *according* to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights; to give such proceedings *any* validity, there must be a tribunal competent by its constitution, that is, by the laws of its creation, to pass upon the subject matter of the suit."

Dated July, 1902.

CHARLES ANDREWS,
Of Counsel.

Suggestions bearing upon the question of res adjudicata prepared after the decision of the Circuit Court.

I.

The answer to the defense of *res adjudicata* is that the question of fraud in procuring the releases has not been decided by any court of competent jurisdiction, and this appears from the whole record in the Amherst College Case, which includes the opinion and judgment of the Special Term, and of the two appellate courts, taken in connection with the parol evidence in the present action.

II.

A judgment in a former action does not conclude a party, unless not only the court pronouncing it had acquired jurisdiction of the person and subject matter, but also that the court rendering it acted in the particular case within, and not in excess of the jurisdiction so acquired. Jurisdiction is not only the power to hear and determine but also the power to render the particular judgment entered in the particular case. Eng. & Am. Encyc. of Law, 1st Ed., Vol. 12, p. 247, and cases cited. There may be full jurisdiction of the gen-

eral subject-matter and at the same time, no jurisdiction to render the particular judgment. If the jurisdiction has been exceeded, the judgment pro tanto does not bind or constrain the party against whom it was rendered. Jurisdiction of courts is an emanation from the sovereign power of the State. The State determines the orbit in which they are to move. If they go outside of their prescribed path, or exceed the powers conferred upon them, their judgments are void and inoperative. The U. S. Supreme Court has affirmed, with great distinctness, the principle that a judgment in excess of jurisdiction, although the court had general jurisdiction of the subject matter, is void. *Ex parte* Lange (18 Wall., 262), and cases cited; Bigelow *v.* Forrest (9 Wall., 339). It is a clear proposition also that while, on the one hand, a court of original jurisdiction only, cannot exercise appellate jurisdiction, so also a court having appellate jurisdiction only, cannot exercise original jurisdiction. Courts are not permitted to transcend the law of their being. They may err in applying the law, or the facts, and yet, so long as they keep within their prescribed powers, their judgments will stand, until reversed by a superior tribunal. The distinction is between an erroneous exercise of power, and an assumption of power not conferred by law.

III.

Judge Tyner, in rendering judgment in the Amherst College case at the Tried Term, ignored the question of fraud in procuring the ordinance, and declined to consider it, on the ground that the or-

cret trust, in favor of the twenty colleges, was valid, and was not in contravention of the Act of 1860; and that the title to the whole residuary estate vested in Ritch, Bulkley and Vaughan, as trustees, irrespective of the releases. If the secret trust was valid, and the title to the whole residuary estate passed under the will to the trustees, and the Act of 1860 had no application, then manifestly the widow and next of kin had no standing, to raise the question of fraud, and that issue was wholly immaterial. It was only on the assumption that the disposition of the estate, or a part thereof, by the will, was invalid, that any rights could accrue to them, under the statute of distribution. The pleadings in the Amherst College Case presented two main issues. *First*, Whether the secret trust was valid as to the whole corpus of the residuary estate, notwithstanding the Statute of 1860; and *Second*, if the trust was invalid as to one-half of the residuary estate under the Statute of 1860, and that part descended to the widow and next of kin, was there a valid release of their interest, which enured to vest their one-half in Ritch, Bulkley and Vaughan as trustees?

It is evident that a general judgment against the widow and next of kin might have proceeded on either one of these two grounds. The court could have held that the widow and next of kin had no interests, for the reason that the trust was valid and not subject to the act of 1860. Or, it could have held, if warranted by the evidence, that although invalid under the statute as to the one-half, that they had executed a valid release and transfer of their interest to the trustees, and

thereby divested themselves of any right. If the trial judge proceeded on the first ground, then the issue of fraud in procuring the releases was (under his view of the law), immaterial, because the widow and next of kin had nothing to release. If the judgment proceeded on the second ground, and the court decided that there was no fraud in procuring the releases, then that question of fact was set at rest, so long as the judgment founded thereon remained unreversed. Where a former judgment is relied upon as *res adjudicata*, of a fact involved in the second action, and the former judgment may have proceeded on a ground not involving a determination of the fact upon which the second action is based, it is always competent, at least when not inconsistent with the record in the former action, to show by parole evidence the grounds of that judgment, so as to exclude any inference that the particular fact was adjudicated thereby. Washington *v.* Steam Packet Co. (5 Wall, 592); Ansonia City *v.* West (7 *Id.*, 106); Russell *v.* Place (94 U. S., 606); Louis *v.* Ocean N. Co. (125 N. Y., 341); Burlen *v.* Shannon (99 Mass., 202); Foster *v.* Richard Burton (100 *Id.*, 409); Herman on Estoppel, Vol. 2, p. 211; 2 Smith Leading Cases, 769, 772; Eng. & Am. Encyc., 1st Edition, Title Res. Adjudicata, p. 191. It conclusively appears by the opinion, and also by the testimony of Judge Truax, that, in deciding the Amherst College case, he did *not* pass upon the question of fraud except so far as to hold that it was an immaterial issue, as it plainly *was*. Upon his view, there was by the will a valid disposition of the whole residuary estate. But many of the cases above cited hold that, where the

record does not disclose the particular ground of the judgment, and it may have passed on a ground which would involve no estoppel, *the burden is upon the party alleging it,* to show that the controverted question *was,* in fact, decided in the former action. The opinion of the Court in Sollar *v.* Hanscome (158 U. S., 221), is instructive on the question of estoppel by judgment.

I do not contend that if the Appellate Court had sustained the conclusion of Judge Truax that the secret trust was valid, and not subject to the Statute of 1860, the widow and next of kin would not be precluded from subsequently litigating the question of fraud in procuring the releases. The Trial Court had jurisdiction of the whole subject matter. It did dispose of the question of fraud, by holding that it was immaterial. If the Appellate Courts had sustained this contention, the widow and next of kin could not have reagitated the question of fraud, in a second suit. The conclusive answer would have been that, by a final judgment of a Court of competent jurisdiction, it had been adjudged that assuming the fraud, yet they were thereby deprived of no right.

IV.

But the General Term did not sustain the decision of Judge Truax, that the secret trust was valid as to the whole estate, and that the disposition of the will was not invalidated to any extent

by the statute of 1860. It reversed the *ground* of Judge Truax's decision, and then, instead of granting a new trial, on which the question of fraud could be litigated, before a duly constituted tribunal for the trial of the fact, it usurped the function of a court of original jurisdiction, and proceeded to consider the question of fraud; and having reached the conclusion on the fact, adverse to the widow and next of kin, affirmed the judgment. In substance the General Term reversed the judgment below. It held that the trust was subject to the statute of 1860, and that a release by the widow and next of kin was essential, to vest the title to one-half of the residuary estate of Ritch, Bulkley and Vaughan. It then, by an *original* and affirmative finding, that the charge of fraud was not established by the evidence, affirmed the judgment. In so doing the General Term exceeded its jurisdiction. It should have granted a new trial. The jurisdiction of the General Term, on an appeal from a decision by a court or referee, upon the trial of an issue, was, at the time of the appeal to, and the decision by, the General Term (1895) prescribed and regulated by section 1022 of the Code of 1876, as amended by the act of 1894. The amended section, so far as material, is as follows: "Section 1022:—The decision of the court, or the report of a referee, upon the trial of the whole issue of fact, may state separately the facts found, and the conclusions of law, and direct judgment to be entered thereon: or the Court or referee, in deciding the case, may file a decision, stating concisely the grounds upon which the issues have been decided, and direct the

judgment to be entered thereon, which decision shall be filed, and shall form part of the judgment roll. * * * Whenever judgment is entered on a decision which does not state separately the facts found, the defeated party may file an exception to such decision; in which case, on an appeal from the judgment entered thereon, upon a case containing exceptions, the General Term of the court, in which the action was pending, shall review all questions of fact and of law; and may either modify or affirm the judgment, or award a new trial, or grant to either party such judgment as such party may be entitled to." The original section 1022 declared that the court or referee deciding the case "must state separately, the facts found and the conclusions of law." It is well known that the main object of the amendment was to relieve the court, or referee trying the case, from the necessity and labor of making special findings in detail of facts or law. The last clause of the amended section, viz.: "and may either modify or affirm the judgment or order appealed from, award a new trial, etc." was substantially a repetition of the words found in Chap. XII, Sec. 1317 of the Code of 1875, relating to "Appeals." The power of the General Term in respect to the affirming, modifying, or reversing judgments, and in granting new trials, was in all essential respects the same in 1895 as it was under the Code of 1875, and indeed from the first enactment of the Code. The cases therefore which construe the powers of the General Term, prior to 1895, are applicable to the judgment of that court in the Amherst College Case. In respect

to the jurisdiction of the General Term, to pass upon the question of fraud in procuring the releases, and to base the affirmance of the judgment of the Special Term upon an original finding by it, that the evidence did not establish the allegation of fraud, we say:

(1.) That, in the distribution of judicial powers, under the constitution and laws of the State of New York, the jurisdiction of the General Term is strictly appellate. It possesses *no* original jurisdiction. The power vested in it to "modify or affirm the judgment or order appealed from, or award a new trial, etc." is to be exercised in strict subordination to the general principle that, where the right in controversy may depend upon the existence or non-existence of a fact, and that fact is put in issue, the General Term cannot decide the fact *ab origine*, and make such finding the basis of a final judgment. An essential fact upon which a right depends when put in issue, and supported by evidence, must have been found actually, or presumptively, by a duly constituted tribunal of fact, to authorize the General Term to render final judgment in favor of such right. If not so found, or if the General Term regard the finding made as against the weight of evidence, it may reverse the judgment and grant a new trial. It cannot itself proceed to find the fact, and then render final judgment in accordance with such finding. This principle is supported by an unbroken line of authorities in the State of New York.

Whitehead *v.* Kennedy (69 N. Y., 462) is one of

the earlier cases. The action was for services as an attorney, and a referee rendered judgment for the plaintiff. On an appeal to the General Term, that court modified the judgment, by reducing the amount and affirmed the judgment as modified. The Court of Appeals reversed the judgment, and directed a new trial. In its opinion the Court said: "The Code, Sec. 330, authorizes the Appellate Court, upon an appeal from a judgment or order to reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, or to order a new trial. This power must be construed in view of the character and function of an Appellate Court, and of the fundamental principle, that questions of fact are to be investigated and determined in the Court of *original* jurisdiction. It is *not* the appropriate function of an Appellate Court to determine controverted questions of *fact*, or render final judgment upon such determination. This would be substituting another tribunal from that known to the Constitution and laws for the trial of causes. The General Term has an undoubted power to reverse a finding of facts and to grant a new trial if in its judgment, justice demands it. This is not invading the province of the Trial Court, for it simply remits the case for another trial, before the Court of original jurisdiction." The opinion in a clause quite applicable to the facts in the present case, says: "It was not within the power of the General Term, after having subverted the ground and facts upon which the Referee decided the case, to proceed to determine upon the examination of the conflicting evidence what amount the plaintiff

ought to recover. This question belonged to the Trial Court. The General Term had no power to find the facts and direct judgment in accordance with such finding, as if the question was before it as an original one upon a *quantum meruit.*"

The case of Thomas *v.* N. Y. Life Ins. Co. (99 N. Y., 250) involved a similar question, and the same rule was declared by the Court.

In Benedict *v.* Arnoux (154 N. Y., 715), the Court expressly approved of the decision in Whitehead *v.* Kennedy, *supra.* In that case the General Term reversed the judgment of the Trial Court in an equity case, upon an original finding of a fact made by the General Term, and rendered a final judgment in favor of the appellant. The Court of Appeals reversed the judgment of the General Term *on the ground* that the General Term *usurped* the function of the Trial Court, in assuming to render final judgment upon an original finding of facts by that Court; and the Court held that under the New York practice there was no distinction in the power of the General Term between equitable and legal actions. There is a long line of cases supporting the principle that the General Term, if it reverses the judgment on the facts, cannot proceed to render final judgment, but must order a new trial. Among the latest of these is New *v.* Village of New Rochelle (158 N. Y., 41), and Van Brennan *v.* Witherspoon (164 *Id.*, 368). The case of New *v.* Village of New Rochelle also affirms the rule established by numerous cases, that the only exception is, where it appears that, in no possible state of proof, could the appellant be entitled to judgment. The Court said, "The rule seems to be well settled that, in

order to justify an Appellate Court in rendering final judgment against the respondent, upon a reversal of a judgment, it is not sufficient that it is improbable that the defeated party can succeed upon a new trial; *but it must appear he certainly cannot.*"

(2) The defendant in support of the plea of *res adjudicata,* seems to rely upon the distinction between cases where the General Term, upon reversing a judgment, undertakes to find the facts, and to render final judgment thereon for the appellant, and cases where the General Term affirms the judgment below upon facts which, although not expressly found, are warranted by the evidence and are consistent with the judgment rendered. There is undoubtedly a well-settled distinction between the classes of cases mentioned; but both classes proceed upon the recognition of a doctrine that facts upon which a right depends, when properly put in issue and controverted, must be found by a tribunal of first instance. In the first class the General Term, having reached the conclusion that the findings ought not to stand, remits the case to the appropriate tribunal for retrial. In cases of the second class, the Court applies the presumption in favor of the validity of judgments, and, in support of the judgment, assumes that all facts warranted by the evidence, and which uphold it, were found by the Trial Court, although not expressly found. It is therefore a recognized principle of appellate jurisdiction that the General Term may resort to the evidence, to gather facts to support the judgment of the Trial Court, because presumptively such facts were found by

the tribunal of fact. But this is not an irrebuttable presumption. When from the record, or the decision, or by the record aided by extrinsic evidence, it appears that a material fact was *not* found by the Trial Court, on the ground that it was held to be immaterial, or for other reason, the party is not concluded in the second action from asserting a right founded on such fact. Suppose it appeared that the Trial Court refused to find the fact in question, or expressly found against it; could it be claimed that the General Term could affirm the judgment, if in its opinion the evidence sufficiently establish the fact which the Trial Court refused to find? Clearly not. Such a procedure would violate the cardinal rule that the facts must be determined by a Court of original jurisdiction. No well considered case can be found to the contrary. The violation of this principle by the General Term in this case, though not so obvious as in the case supposed, is equally clear. The fact of fraud in procuring the releases was ignored by the Trial Court. It did not decide it because the Court held the fact to be immaterial; and to have decided it under the view of the law held by the Trial Court would have been an extra-judicial proceeding. The opinion of Judge Truax exhibits the ground of his judgment, and the legal inference from the record presented to the General Term is that the fact of fraud in the releases was not considered. The evidence in the record shows that the question was litigated. There was abundant proof that the releases were obtained by fraud, menace, and through the violation of trust relations and obli-

gations. The General Term, in its opinion, states that the evidence did not "justify" a finding of fraud. But the Court could not know that *additional* proof of the fraud might not be furnished, on a new trial. It had no power to conclude the widow and next of kin by a final judgment. The cases cited by the learned counsel for the defendants in support of the right of the General Term to affirm a judgment, if, upon an examination of the whole evidence, they are able to find facts to support it, all proceed upon the presumption that the necessary facts were found by the Trial Court, although not expressed. When this presumption is rebutted, as in this case, as well by the record as by the extrinsic evidence, there is no case which I have been able to find in conflict with the fundamental principle that the General Term cannot preclude a party, by assuming to decide, in the first instance, controverted facts *not* found by the Court of original jurisdiction. No good reason can be assigned why the same principle should not be applied, whether the judgment is one of affirmance or reversal.

V.

The affirmance by the Court of Appeals of the judgment in the Amherst College Case, adds nothing to the defense of *res adjudicata*. The decision of the Trial Court was *general* in form, under Section 1022 of the Code, and contained no specific finding. The affirmance of the judgment

of the Trial Court by the General Term was unanimous. The opinion of Judge Van Brunt only differed from the opinion of the other judges on the construction of the rights of next of kin, under the statute of 1860; but he united in the affirmance of the judgment. The power of the Court of Appeals in such cases is stated in the opinion of the Court in the Amherst College case. Judge Vann says: "Where the decision of the Special Term does not state the facts found, and the judgment entered thereon has been affirmed by the General Term, upon an appeal to this Court all the facts warranted by the evidence and necessary to support the judgment below, are presumed to have been found. Hence, upon such an appeal we have no more control over the facts than we have where specific findings are made by the Special Term, and affirmed by the General Term. This conclusion takes the question of fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin, in procuring the releases, out of the case; for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant an inference of fraud, there was also ample evidence to warrant the inference that there was no fraud. A question of fact was thus presented which is beyond our power to review." The Court of Appeals, by its constitution and its construction of its powers, was imperatively limited, in its review of the question of fraud, to the one question, viz., Was there evidence from which the Court might have found that there was no fraud? If it found that there was

such evidence, then its function as to the facts ended, and it was bound by a conclusive presumption that the fact was in accordance with such evidence, whether such finding was or was not made by the Trial Court, or was refused, or for whatever reason the Trial Judge omitted to pass upon it. A still more drastic rule, limiting the jurisdiction of the Court of Appeals, over the facts, was imposed by the Constitutional Amendment of 1894 (Art. 6, Sec. 9), which provides "that an unanimous decision of the Appellate Division of the Supreme Court, that there is evidence to sustain a finding of fact * * * shall be reversed by the Court of Appeals." In such case it is powerless to give relief, although there is no shred of evidence of material facts. And it has long held that a mere affirmance by the Appellate Division of a judgment, rendered on a decision by the Trial Court, without specific findings, is to be construed, for the purpose of review, in the Court of Appeals, as a finding by the Appellate Division that there was evidence to sustain every fact requisite to support the judgment, even although it appeared from the case that no such evidence was given. *People v. Barker* (152 N. Y., 121). It is idle to say, in view of the circumscribed powers of the Court of Appeals, that the plaintiffs had their day in Court on the vital question on which their right depends. It is said by an elementary writer, that "If any question of fact, or liability, is conclusively presumed against a party, this is not due process of law." Herman on Estoppel, Sec. 69, and cases cited.

CHARLES ANDREWS.